EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 11-1086 (FLW)

MARNIE GLOVER, etc, et al.

Plaintiffs,

v.

FERRERO USA, INC.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

JULY 9, 2012

CLARKSON S. FISHER UNITED STATES COURTHOUSE
402 EAST STATE STREET, TRENTON, NJ 08608

B E F O R E : THE HONORABLE FREDA L. WOLFSON, USDJ

A P P E A R A N C E S :

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SCOTT & SCOTT, LLP (NEW YORK)
BY: JOSEPH P. GUGLIELMO, ESQUIRE
ERIN GREEN COMITE, ESQUIRE
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SEEGER WEISS, LLP (NEW YORK)
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DAVIS & TALIAFERRO, LLC (ALABAMA)
BY: GREG L. DAVIS, ESQUIRE
On behalf of the Plaintiffs

WILSON SONSINI GOODRICH & ROSATI, ESQUIRES (CAL.)
BY: KEITH E. EGGLETON, ESQUIRE
On behalf of the Defendant

(Continued.)

* * * * *

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ON BEHALF OF THE OBJECTORS:

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On behalf of Amy Ades

CHRISTOPHER V. LANGONE, ESQUIRE
On behalf of Agatha Bochenek,
Brandon Goodman, and Edward Hagele

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C E R T I F I C A T I O N

PURSUANT TO SECTION 753, TITLE 28, USC, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

S/Vincent Russoniello
VINCENT RUSSONIELLO, CCR
OFFICIAL U.S. COURT REPORTER

I N D E X

(In open court.)

THE CLERK: All rise.

THE COURT: Good morning.

I'll have the appearances. Everyone else may be seated.

MR. CECCHI: Good morning, your Honor.

James Cecchi, Carella Byrne, on behalf of the Class.

With me this morning is my co-counsel, Joseph Guglielmo, from Scott & Scott.

MR. GUGLIELMO: Good morning, your Honor.

THE COURT: Good morning.

MR. CECCHI: Also, plaintiffs' counsel is Stephen Weiss from Seeger Weiss.

MR. WEISS: Good morning, your Honor.

THE COURT: Good morning.

MR. CECCHI: Greg Davis and Erin Comite, also from Scott & Scott.

MR. DAVIS: Good morning, your Honor.

MS. COMITE: Good morning, your Honor.

THE COURT: Thank you.

MR. EGGLETON: Good morning, your Honor.

Keith Eggleton for Ferrero U.S.A.

Along with me is my client's general counsel, Beth Kotran.

MS. KOTRAN: Good morning.

THE COURT: Thank you.

MR. LEVY: Good morning, your Honor.

Lester Levy for objector Any Ades.

MR. GREENBERG: Good morning, your Honor.

My name is Dan Greenberg. I'm representing myself.

MR. LANGONE: Good morning, your Honor.

Chris Langone on behalf of objectors Agatha Bochenek, Brandon Goodman, and Edward Hagele.

THE COURT: Thank you. You may have a seat.

We are here today, obviously, for the request to approve the class action settlement and fees in this case, to certify the class, and grant final approval.

The first thing, however, that I would like to do is:

One, I'll note that I received many submissions in this case: I've received the briefing from class counsel, and then I received objector briefing, letters as well, and then I received the responsive papers last Monday from class counsel; and then Ferrero as well filed papers at that point; and then there were some additional papers filed at the end of the week by Mr. Greenberg with regard to the

declaration of Larry Johnson. And I did convene a conference call on Friday, which was not on the record, but counsel participated, class counsel, as well as Ferrero, and as well as Mr. Greenberg on that conference call. It was not, as I said, on the record. I indicated that I would address it formally this morning, though I gave my ruling at that time.

Let me just, at this time, make clear what that ruling was. That was last Friday, July 6th, that I indicated that I would be striking the report of R. Larry Johnson who was valuing the injunctive relief.

Mr. Greenberg had made a motion -- had made several motions, actually. One was to unseal the redacted report of Mr. Johnson. The redactions were reflecting sales figures that have been produced by Ferrero pursuant to a confidentiality order and an order had been entered by Judge Arpert agreeing to the filing of the redacted report to protect what had been designated as confidential information.

I will note that on the conference call Mr. Eggleton indicated that he would be willing -- because, also, Mr. Greenberg is an attorney at law -- that he would be willing to unseal the report to him if Mr. Greenberg were willing to abide by the

confidentiality order in other respects. However, because I had already determined that the Johnson report would not be used, that essentially mooted the motion for sealing, and thus that was denied.

Let me indicate my rulings with regard to the Johnson report.

The Johnson report values the injunctive relief that was achieved in this case based on the increased sales of Nutella after defendant began its advertising campaign in 2008. Based on quarterly sales figures, Mr. Johnson found that there was a higher average annual increase in sales now as opposed to before the campaign. He assumed some amount of that increase was attributable to the allegedly deceptive statements or advertising messages. Because defendant will now be prohibited from using the same statements, allegedly deceptive statements, Johnson argued defendant would suffer a loss.

He then goes on to opine that if this is only even a 1 percent loss, calculated over the next three years it would yield a loss of $9 million and could conceivably be a loss of up to approximately $41 million, depending on the figures.

Based on this, class counsel valued the injunctive value at a significant amount and argued

with regard to a fee award of $3 million being appropriate.

I note that Mr. Johnson submitted his report well after the parties had agreed to the fee being requested for the injunctive relief. My concern with Mr. Johnson's report was not the timeliness of the report so much as perhaps the fortuitousness of his after-the-fact findings. What he did not address in his report and what I found was fatal to his findings is whether any of the increased sales of Nutella were truly caused by what plaintiffs claim to be the allegedly deceptive advertising or marketing.

I found and I do find that the report is speculative and based on conjecture because Mr. Johnson cannot attribute with any certainty an increase in sales to the allegedly deceptive statements only.

A critical fact and what Mr. Johnson apparently chose to completely ignore was that this was the first major Nutella ad campaign in the United States by defendant. I note that that appears in the brief that was filed by Ferrero at page 11, note 2; and they say:

"The challenged advertising campaign was the first time that Nutella had ever been advertised in

the United States in any meaningful away."

Indeed, when I questioned counsel on the phone, class counsel admitted on the conference call that they, as well as Mr. Johnson, were aware of this fact prior to Mr. Johnson's report and while counsel revealed that they had informed Mr. Johnson of this fact. It stands to reason that the advertising, even without the allegedly deceptive nutritional information, would cause an increase in sales since the product was being exposed for the first time to a wide United States market.

Nonetheless, Mr. Johnson failed to even note this fact and, instead, provided no analysis to suggest what effects an advertising campaign, without the allegedly deceptive statements, -- presumably the ad campaign that the defendant has now agreed to undertake -- would have on the sales of Nutella.

Class counsel conducted no surveys and provides no evidence in the record to show that increased sales occurred specifically because of the deceptive statements or labeling or because of an advertising campaign generally. Even if the sales were increased because of the alleged deceptions, there is no evidence in the record to suggest that the sales will now decrease.

Ferrero argues it has a very loyal fan base and its sales have increased despite the negative publicity flowing from the consumer fraud lawsuits.

Because of these reasons, I am striking the report.

Let me note in the briefing submitted by plaintiffs' counsel they argued that the Court should not undertake a Daubert analysis, and that Daubert does not apply in a fairness hearing context, largely relying on case law from the Sixth Circuit and other jurisdictions. The Third Circuit case cited by the plaintiffs, which was the Warfarin case, doesn't exactly say what is suggested. Indeed, the Court in Warfarin doesn't refer to Daubert. It simply says that the District Court reviewing the expert report and some of the supporting materials concluded that Dr. French's estimate of the range of possible damages was reasonable if the case were to go to trial.

Yes, so what it notes is, it doesn't specifically or expressly state how or if Daubert could be used but implicitly indicates you do not need a rigorous Daubert analysis.

I note that more recently the Third Circuit in the Dewey case, -- and that was Dewey v. Volkswagen at 681 F.3d 170 -- decided May 31, 2012 -- the Third

Circuit in reviewing the hearing conducted by Judge Schwartz noted that Judge Schwartz had done a Daubert analysis in the fairness hearing, the settlement fairness hearing, with regard to an expert's testimony and found that she had undertaken, indeed, a painstaking analysis, and they found that the Court did not abuse its discretion in declining to exclude testimony in its entirety. She excluded certain testimony based on her Daubert analysis.

Clearly, the Third Circuit did not opine its opinion that engaging in a Daubert analysis was not appropriate. And while I note here that I have not engaged in a painstaking Daubert analysis, I do not find it would be necessary here because I find that the opinion of Johnson has no core foundation to support it. His reliance on conclusions without analyzing the critical fact that there had been no advertising before gives his opinion no legs to stand on, and it would be ill-advised by this Court, therefore, to consider his opinion in any fashion.

So I have struck that report. That's how we begin.

Now, I have a couple of questions before anyone wants to do presentations or present argument.

One is that there seems to be an error in the

most recent declaration of Charlene Young from Rust, and that is the following:

Ms. Young notes that as of May 23rd, Rust had received 253,413 claims. Then she notes the additional claims that were received between that date and June 29th, when the final declaration was to be filed, and said there were an additional 13,629 claims filed, and then she says Rust received, therefore, a total of 208,248 claims. Clearly wrong. Less than the number she had the first time.

MR. GUGLIELMO: I can clarify, your Honor.

This is Joseph Guglielmo on behalf of plaintiffs.

The declaration of Ms. Young is attempting to describe to you the amount of claims -- both in the California, which is a separate class, and the nationwide class. And I will admit it wasn't articulate in that there are 208,000 nationwide claims that were filed in this action and then there were the additional claims the 74,000 claims that were filed in the California action. She's combining it because this is a joint notice program that we enacted with the attorneys in California to effectuate the settlements both here and in California.

THE COURT: Certainly not clear from what she

wrote because, in fact, in her first certification in paragraph 10, she's talking about our class action settlement agreement, and she talked about potential settlement class members. So it's not what I got from it.

MR. GUGLIELMO: Your Honor, we are more than happy to have Ms. Young submit a revised declaration that clarifies these numbers for you and for the Court.

THE COURT: I see in paragraph 10 where she's trying to explain it, but it is not crystal clear, her supplemental certification. But, all right. It wasn't clear to me.

Let me also, just at the outset I would like to discuss with counsel the manner in which your rates, hourly rates, were submitted for the work done, which was done only for purposes of the lodestar check, because you are not actually looking for a lodestar recovery but a percentage of the common fund. But I have a problem.

I appreciate that you need not give me chapter and verse of what your fees are. But I must point out that at least with the Carella firm I had codes that indicated what kind of work was being done by which attorneys. I had nothing from the other attorneys as

to how many hours were spent on what tasks; and it, one, creates grave concerns for this Court in determining whether you have provided me an adequate basis for determining what your real fees were for the lodestar check because everyone gives the same general descriptions: You worked on motions. You worked on discovery. You worked on the settlement. And I've got five law firms all telling me the same thing which leads me to believe duplication of effort, and no one has broken this down -- and also such substantial number of hours that were spent where the Court can't even assess in the broadest fashion whether it was reasonable amounts of time being spent.

I start with that. No breakdown at all even in a summary fashion.

I also want to question each of plaintiffs' counsel that has submitted a declaration with regard to the hourly rates being provided to me. I want to know if what you are representing to me is that the hourly rates that you have listed are the hourly rates that your firm, that these lawyers in your firms -- whether these are the hourly rates that these attorneys charge your clients generally, those who actually pay hourly fees, and that is what you receive, as opposed to whether these are rates that

you claim to use in class actions for which no one is ever paying an hourly rate because they are taken on contingent fees.

So I'll start with you, Mr. Cecchi.

Are the rates that you have listed for you your partners and your associates the rates that are generally charged by your firm by these lawyers for work that is done by your firm?

MR. CECCHI: Judge, these are the rates and forms that we utilize in every contingent case that I have been involved in, and my hourly practice. And I do a huge amount of hourly work. The rates vary, depending upon a particular retainer, all the way from almost $500 to $650. But the rates that are reflected in my affidavit and breakdown, I've been using these rates in every contingent, including private contingent cases since 2007.

THE COURT: That wasn't my question. And I understand, and everyone knows where I'm coming from in asking these questions.

You can set the moon for your contingent fee hourly rate, because you're never collecting an hourly rate. So I need to know when I'm doing a reasonable lodestar crosscheck what is the customary hourly rate.

And I say this particularly, because putting

aside, Mr. Cecchi, you may be a very able and experienced attorney, and you may actually charge $750 for your work, I don't believe your associates -- that any client you got is paying $550 for your associates for hourly work in a New Jersey firm, not that I know of.

MR. CECCHI: Maybe not some of them, but some of my junior partners.

THE COURT: I didn't say "partners." I said "associates."

MR. CECCHI: You are right. And I think I stand in a somewhat unique position because we do have a blended practice where we do a lot of litigation, retained complex commercial, and so on.

But I have your Honor's point, and I think that I can address it because I was going to make the remarks about the fee in any event. I think I can address it at that time.

THE COURT: That's fine.

Similarly, I've got from the attorney -- I guess it's Mr. Davis from Mobile, Alabama.

MR. DAVIS: Montgomery, Alabama.

THE COURT: Montgomery. I'm sorry.

(Continuing) -- and you tell me $700 is the normal fee in Mobile. Boy, the New Jersey lawyers are

going down there!

MR. DAVIS: That's the fee I charge in all my contingent cases.

THE COURT: Contingent, again.

What's the normal hourly rate in Montgomery for work done, legal work?

MR. DAVIS: It depends on the case, your Honor. I charge $500 an hour for some cases. I charge more than that for others. But, typically, around $500 an hour.

THE COURT: Who else have I got?

You are Mr. Guglielmo. Right?

MR. GUGLIELMO: Yes, your Honor. And these are the rates that Scott & Scott charges. We do almost exclusively contingent fee work. We have some hourly rate cases, and it's my understanding that these are the same rates that we use for those very, very small hourly rate cases that we have, but we almost have almost none.

THE COURT: Okay.

Who else do I have that's made a fee application?

MR. WEISS: Your Honor, Stephen Weiss from Seeger Weiss in New York City.

The rates that I attested to are in fact

Seeger Weiss' hourly rates. We have a number of hourly clients. Those hourly clients pay those rates. I can attest to that as well. So I think across the board, from partner to associate to paralegals, all of the rates so stated in the declaration are our actual hourly rates.

THE COURT: Okay.

Now, who is that? Scott & Scott, $635 an hour for associates?

MR. GUGLIELMO: Yes, your Honor. Certain associates are actually very senior in age.

THE COURT: People that you don't make partners, they are called "associates." I see. That's fine.

All right. I think counsel appreciates what I'm saying with regard to when I apply the lodestar check, how I will be looking at it, because, as I said, it's really not fair, I believe, that in these contingent fee cases to essentially come up with a number that's not your real hourly billing rate number for purposes of the cross-check, and that's my view because, as I said, in a contingent fee case where you never intend to collect against the client or charge him for that hourly rate, you can charge him $10,000 an hour and it would make no difference, and it's not

appropriate for the Court to consider that rate if it's not the real rate.

So I'll put that aside.

I still have -- and we'll address this when we get to the fees as well, though, and I really was left at a loss by all of you submitting these kinds of, in the most general fashion, other than Mr. Cecchi's firm, any breakdown of how many hours you spent on a task. There wasn't that much that happened in this case. How could it be? Hundreds upon hundreds of hours each of you are spending doing the same thing? I've got a problem with it. We'll talk about it later.

Let's at this time address the settlement.

What I want to address -- and I'm going to consider the arguments separately, obviously -- the fees from the overall monetary settlement that was being achieved for the class, and it's appropriate to consider whether that meets all the criteria on the monetary settlement, and then consider what fees would be appropriate assuming that is approved, and then separately consider the injunctive relief portion and the fees in that regard.

Now, I certainly have received substantial briefing from everyone. I have several objectors here

-- and, frankly, most of the objections really are dealing with the fee as opposed to, I think, the fairness or reasonableness of the monetary settlement. And others, of course, take great issue with the injunctive relief. That's another subject.

I want to first deal with the monetary settlement here. There really has not been, I think, any material or substantial objection to the monetary settlement.

Yes.

MR. LEVY: Your Honor, --

THE COURT: Come forward.

You have the Bochenek objectors?

MR. LEVY: No. Amy Ades, your Honor.

THE COURT: Well, that's because for Ms. Ades you filed a complaint for her in New York and you want to carve her out of this because you want your own piece of the pie.

MR. LEVY: I want my own class to prosecute, your Honor, yes.

THE COURT: Tell me why this isn't fair. I understand you do.

MR. LEVY: I'll tell you.

THE COURT: I haven't seen it in your papers.

MR. LEVY: All right.

Less than two weeks ago, after my papers came in, the Third Circuit reversed District Court's approval of the consumer class action. It was actually Mr. Cecchi's class action. It was in the AT&T Mobility case.

THE COURT: I'm familiar with that.

MR. LEVY: And the Court said that the District Court did not adequately supervise the approval of that, and breached the discretion of the Court in approving the settlement.

One of the things I think the Court should do in looking at the cash component of this settlement is see if the fee of the 2.5 million -- what is that worth? What percentage of damages?

I know in a securities class action the notice has to say --

THE COURT: Put aside securities class actions. That's not what this is.

MR. LEVY: But the plaintiff has the burden of showing the the 2.5 million, which nets to about 1.3 million to the class, is the appropriate amount.

THE COURT: I haven't ruled on the fees yet.

MR. LEVY: I'm talking about the 2.5, just starting with the 2.5.

THE COURT: I know. But you said it yields

1.3 for them. We're not there yet as to what it yields.

MR. LEVY: If 2.5 is 10 percent of the potential damages, 5 percent of the potential damages, one-eighth of 1 percent, we should know that. The Court should know that. The class should know that. If it's such a tiny portion of the potential damages, it's because the case is so bad that they have to settle for that, and they haven't said that. But they also haven't said what percentage of damages it is. I think the Court cannot approve a 2.5 million without knowing how good the case is compared to what the potential damages are.

THE COURT: Well, I'll let plaintiff respond first, but I have several responses to you. But I'll let them, if they would like to, argue first.

Who is going to be arguing that?

MR. CECCHI: Judge, with the Court's permission, Mr. Guglielmo and I have divided it. He has the bulk of the objections. But since Mr. Levy felt it appropriate to touch upon where I consider to be somewhat of a sore subject, the Sprint Larsen settlement, I just wanted to briefly address that.

The Sprint Larsen case was a unique case. Judge Linares conducted a four- or five-day

preliminary approval hearing where we had witnesses on the stand. It was a conflagration of sorts. He wrote over 200 pages of opinions. I don't want the record to reflect that Court of Appeals said Judge Linares did not go to great lengths to discharge his Rule 23 duties. He indeed did. It's a discrete issue involving whether Sprint had to do a costly expensive data dump of its data bases and what it would yield in terms of notice. It was reversed and remanded for Judge Linares to do further findings. They did nothing about the fairness.

The fee was affirmed, your Honor, in the companion case against T-Mobile, and the fee was affirmed in the companion case against ATT. Both of those cases were affirmed. So the discrete issue has nothing to do with here.

In terms of Mr. Levy, I think your Honor's initial observation is the correct one. His case was filed after we had already mediated with Judge Politan and reached an agreement in principle. We advised Mr. Levy of that fact, that we had already settled in principle, and we were in the process of documenting the settlement when he filed his case.

So we think this is nothing more than someone coming forward seeking something they are not entitled

to here. It has nothing to do with the fairness of the settlement.

Thank you, your Honor.

(Pause.)

MR. CECCHI: Can I make one very just introductory comment, Judge?

THE COURT: Yes.

MR. CECCHI: I know there are a lot of objectors here, and there has been a lot of press, and it's my practice and I think the practice of all the lawyers who've represented the plaintiffs in this case to comment in court, to comment to your Honor, and to comment in our papers. We have not had an opportunity to say to these objectors and to say to the press the background of this case.

First of all, I want the Court to know we are proud of what we achieved in this case, we stand behind what we achieved in this case, and it's a particularly bittersweet sort of situation that I find myself in and these other lawyers, and I know Keith feels the same way. This is the last case any of us ever did with Judge Politan. He worked very hard on this case as we all did. This was a difficult case for the plaintiffs. It was a difficult case from the perspective of damages. All consumer cases are. This

case perhaps more so.

Ascertainable loss was an issue where we felt we had arguments, good faith arguments, but issues that would have been had they gone the other way would have been fatal to a damage claim in this case, and that was an issue that was explored in detail in mediation with Judge Politan.

So we are glad we are here today. We look forward to talking about all the alleged deficiencies in the settlement, which we don't think there are any, but I do want to say that background is important. This was supervised by the nation's leading mediator; and one of the objectors, and it's really amazing, said they didn't even bother having an affidavit from Judge Politan about what happened. We would have liked to have had that affidavit, Judge, and I think Judge Politan would have agreed with me that this was a hard fought mediation, this was a difficult case for us, and we reached a good deal for this class, and, as I said, we do stand behind it and look forward to talking about it today.

Thank you, Judge.

MR. GUGLIELMO: Good morning, your Honor. Joseph Guglielmo with Scott & Scott.

My question is: Do you want me to respond to

Mr. Levy's comments or do you want me to go forward with presenting argument to the Court of the final approval?

THE COURT: Well, is Mr. Levy the only one that's going to be addressing the fairness of the monetary settlement?

Mr. Greenberg, you are going to be as well?

MR. GREENBERG: Yes, at some point briefly.

THE COURT: Why don't you hear the objections, then, before you address them.

Why don't I hear from you now. This is not on the fees portion; only the overall 2.5-million-dollar monetary settlement.

Is that what you are going to address?

MR. GREENBERG: Yes, your Honor.

THE COURT: Come forward, Mr. Greenberg.

MR. GREENBERG: Very briefly, your Honor.

I just would like to make one point about the structure of the settlement which I think is related to what you are talking about, and that's the concern about reversion of the fee to defendant.

Our concern here is that --

THE COURT: I'm talking about the monetary settlement, and there is no reversion of a fee to defendant. What you are talking about is on the

injunctive relief portion. I'm dealing with that separately. I'm talking about the monetary settlement.

MR. GREENBERG: I apologize, your Honor.

THE COURT: Thank you.

I didn't think there was any other objection to addressing the fairness of the monetary settlement. Because, as I also understand, as some of the objectors have even put into their papers, they are not even sure who wouldn't understand that this was a hazelnut chocolate spread.

Go ahead.

MR. GUGLIELMO: Joseph Guglielmo, again, on behalf of the plaintiffs.

Your Honor, the issue with respect to what Mr. Levy raises as to the fairness of the settlement, it simply goes to one of the sort of overall objections that he thinks it's not enough. And there are numerous cases we cited in our brief, including Hall v. AT&T, which says it is not a valid objection to the settlement to say: Well, you could have gotten more. You need to look at the circumstances of the case and where we were in the case.

We had pending motions to dismiss that would be filed. We had class certification --

THE COURT: Actually, had been filed and then were terminated. The actions were consolidated. In fact, I never got a consolidated amended complaint in this matter.

MR. GUGLIELMO: We had drafted one, your Honor, and we reached a settlement. So at that point it was essentially moot.

With respect to his specific argument, your Honor, we made available to class members a fund that would compensate them for over a hundred percent of the purchase price for Nutella based on the claim rate which has been very high. I think that goes to show you folks are very happy with the settlement. We have over 208,000 claims in the nationwide settlement. Class members will receive anywhere from 37 percent of the purchase price of the smaller jar and 20 percent of the purchase price of the larger jar. There are two essential jars that are sold to class members during the period.

A number of the objectors are saying: Well, you should have gotten 100 percent. Well, the problem with that is that we recognized, and as the Court recognized, when you receive something in exchange for what you pay for, it's very difficult to say that you are entitled to the purchase price.

THE COURT: You would not have been entitled to the purchase price. Let's put an end to that argument.

MR. GUGLIELMO: Your Honor, and we put that forth in our papers.

So the question is what percentage of the purchase price we could be required or we could obtain if we were successful.

Your Honor, you could find as a matter of -- either at summary judgment or class certification -- that we were entitled to nothing, because Ferrero would have argued that no class member was deceived. They did get what they bargained for, which was a tasty nut spread that kids love. And the issue there was: Well, what percentage of damages is reasonable?

The percentage recovery that we were able to obtain is well within this Circuit's and this District's standards for appropriate recoveries. You have class settlements where folks get 5 percent, 10 percent of the dollar damage. Here they are getting 20 to 37 percent of the purchase price, which could be over 100 percent of damages, your Honor, depending on how it's calculated.

THE COURT: By the way, let me just put this question. I don't want to belabor this. We have so

much briefing on these issues. But one of the things -- and I'll address this in the opinion that I will read into the record in a bit, but we obviously recognize that there were issues of one surviving motion practice as to whether, indeed, first, there was unlawful conduct; second, as to whether there was an ascertainable loss and causation between the three -- all of which must be proven in a New Jersey Consumer Fraud Act case.

With regard to ascertainable loss, another item would have been when you talk about what did the consumer get and what might they have expected to get, and if you compare this to what is another hazelnut chocolate spread, there is no indication that, one, there were such comparable products on the market at this time, though I understand there are ones entering the market now, and what the pricing would have been, and whether the pricing of Nutella was different or not than what would have been advertised as just a tasty spread.

I do not think that, Mr. Levy, you have a basis to really dispute that ascertainable loss here was going to be a major, major roadblock. I will make specific findings about that in a bit, but I do not need to belabor that.

I should state on the record, because Mr. Cecchi got up to make the comment, some of the objectors referred to whether there was some sort of collusion here between either the defendant and plaintiffs' counsel and/or the mediator. Wrong. There is no evidence of that.

Judge Politan was a colleague of mine. I'm familiar with him and his stature, the late Judge Politan -- by the way, he was not chief judge. I think you referred to him as that in your papers.

MR. EGGLETON: He always felt that way to me, your Honor.

THE COURT: Okay. The person who was the chief probably wouldn't have been happy to have you refer to him that way.

MR. EGGLETON: I apologize for that.

THE COURT: But he has been used as a national mediator. His credentials were impeccable.

And I understand what this case was about, and I do not find that there was anything that was produced here that would indicate collusion. So I'm putting that to rest. I don't want to hear any arguments about it.

MR. GUGLIELMO: Thank you, your Honor.

THE COURT: Do you want to make any comments

besides the pages of briefing I have as to the fairness of the monetary settlement?

MR. GUGLIELMO: No, I think that's succinctly set forth.

THE COURT: I was dividing these issues up because I have objectors on different issues as well.

All right. Let me hear from -- I think it's you, Mr. Greenberg, who wanted to address the injunctive relief aspect.

MR. GREENBERG: Well, on the fact of injunctive relief and the concerns about the value of injunctive relief, I don't know that I have too much to add to the briefing.

I simply want to make the point that, obviously, it's not my role as an objector to bear the burden of demonstrating the settlement has no value. Class counsel suggests that we have some sort of burden in their papers to demonstrate the settlement has no value. Obviously, they have the burden to demonstrate that it has value.

Obviously, the first expert report avoids the question of the monetary value of the injunctive relief, and, obviously, the second report doesn't have the standing because of your ruling last week.

There are some cases that they cite in their

response that injunctive relief has value that I believe are quite inapposite. Two of those are shareholder cases and the third is a pension retirement case. In those cases there is a stronger argument to the value of injunctive relief because the corporation is going to be stuck with its future self and the pensioners are always going to be stuck with a pension. This is different. Even in that context, the law in the Third Circuit says there are grounds for skepticism about the value of the injunctive relief in those cases.

And if you'll forgive me, I'm going to read you two sentences from Bell v. Bolger, from the cases they cite, and that's 2 F.3d 1304; and those sentences are:

"The difficulty in valuing therapeutic relief poses significant risks. Parties may capitalize on the valuation problem and exchange cosmetic reforms for plaintiff fees."

Those quotes are in the opinion.

So it's my view that the injunctive relief is essentially valueless. I was surprised, of course, to see the response from class counsel which says that all I provided for my view that survey evidence is necessary to demonstrate the value of injunctive

relief -- they say all I provided was naked assertions. In fact, I provided appellate case citations for my view that some sort of survey evidence is necessary to demonstrate the value of injunctive relief. They respond by saying survey evidence is not needed. They cite nothing for that, and I would call that a naked assertion.

THE COURT: Certainly, I will tell you, as I made my ruling with regard to the Johnson report, if they wanted to rely on specific numbers, as the Johnson report did, a survey would have been appropriate, but, ultimately, that's not what we are doing. Now it's more in the nature of: Can you discern some benefit from these changes in advertising so that the injunctive relief has some benefit? The question of how to value, that is a very different matter.

I have to say, Mr. Greenberg, I think you may be hard-pressed to say it has no value.

MR. GREENBERG: I think it's probably fair to say it has very little, or I think, perhaps, an appropriate phrase might be, essentially none. I think there is some question as to the value of a reform that puts nutritional information on the front of a package as opposed to the back of a package. I

have a general view, I suppose, about how often people look at this nutritional information. Some people do and some people don't, obviously.

THE COURT: Those to whom it matters.

MR. GREENBERG: Right. It seems like the number of people who are looking for nutritional information -- and who will not look at the back, but, instead, will look at the front -- would have to be awfully small. So I would say there is a pretty strong argument the value is essentially nil from any of these things.

THE COURT: That's one of the items which is putting the information on the front in addition to the back. The other is changing the message, the wording of the message, and the way the TV commercials will run, and things of that nature, which changes the wording a bit.

MR. GREENBERG: Yes. And there is certainly an argument that the new slogan, instead of making things better, arguably makes things worse because it seems to suggest a nutritious breakfast and a healthy breakfast is not generally a taste breakfast. As a parent, I suppose I have a concern about that sort of message being sent out to my children.

So I think there are fairly strong arguments,

actually. I'll be happy to go through them one by one if you would like, your Honor, but it's in the briefing.

THE COURT: I have your papers.

MR. GREENBERG: Thank you, your Honor.

THE COURT: Yes? Another objector wishes to be heard?

MR. LANGONE: Yes, your Honor.

THE COURT: Please state your name for the record.

MR. LANGONE: Chris Langone of the Bochenek objectors.

On the value of the injunctive relief, I would just like to make two brief points.

MR. CECCHI: Judge, I don't want to interrupt Mr. Langone, but we have a threshold issue about Mr. Langone's standing.

THE COURT: Yes. I have that question, actually, because there is nothing that indicates that those who you represent are part of the class. They have not indicated that they actually purchased Nutella.

MR. LANGONE: They did, and I have signed affidavits from all my clients that I'm prepared to file if given leave. I didn't want to just file

without leave. That was an oversight. My clients had thought they had made that claim when they signed the objection. So there was an error. But I do have signed affidavits, and I could file them today with leave, that they all bought jars of Nutella.

THE COURT: I'll accept your representation that they are with you and can be filed.

Go ahead.

MR. LANGONE: Your Honor, so the two points that we want to make on this is, first, we did submit an affidavit from Dr. Freehof. We are not trying to submit it, obviously, given the Court's comments on Daubert, as an expert, but I think that just as a plain reading and as evidence the Court can take to change the phrase from an example of a "tasty yet balanced breakfast" and replacing it with "turning a balanced breakfast into a tasty one" might have some significant value to the defendant in giving a kind of a judicial stamp of approval to its advertising campaigns, and I think that gets to be a questionable kind of --

THE COURT: The Court isn't approving advertising today, and I'm not being asked to approve particular ads. That wasn't made part of the settlement.

MR. LANGONE: If the junction is approved and, arguably, if anyone tries to make a claim, subsequently, that somehow that this is deceptive -- for instance, for the reasons Mr. Greenberg and Dr. Freehof state, they would be barred presumably because the defendant would point to the Court and say this is pursuant to an injunction.

THE COURT: All the injunction does is say this is what I'm prepared to do. It doesn't require the Court to give its imprimatur and say: I agree; Oh, there is no way this is deceptive; or, It passes muster. All they are asking is approval of that. They are going to agree to make certain changes. That's all that it is.

Look, ultimately, on the injunctive relief, the question isn't: Is it the best? Is it perfect? I could have thought of lots of ways that I might have done this differently, including using the agency in New York that reviews advertising. That's not what they agreed to.

The question for settlement purposes and looking at injunctive relief in these cases isn't whether it's the best relief, but: Does it provide a benefit?

MR. LANGONE: And the only other point I want

to make on the injunctive relief is that as to the value, it's our position, following the Ninth Circuit guidance in Bluetooth, that -- obviously, we realize is not binding on this Court, but what we think the Court might be persuaded by is to look at the total package deal of all the cash the defendant is willing to pay. So if they are willing to pay 3 million in attorneys' fees on the injunctive side and 2.5 million as a pot to go to the class, that's really a 5.5-million-dollar pot of money that could be going to the class. And the Ninth Circuit said that you should look at it as a package deal in assessing a common fund; that you shouldn't just look at the portion that the parties say: We'll call this the fund, and this is the attorneys' fees -- the whole cash benefit that could potentially go to the class.

And this brings up the issue of reverter, and I don't want to get ahead of that. But just in terms of value, it's our position that the value of the injunctive relief to the class is at least 3 million to the extent that the class has any right to lay a claim to those attorneys' fees; and under the general law, under fee shifting statutes --

THE COURT: That's assuming I would agree that it even has a 3-million-dollar value. I haven't

gotten there yet.

MR. LANGONE: That's the only other point I want to make, that we do take the position it's a package deal, your Honor.

THE COURT: Thank you.

Yes, Mr. Levy.

MR. LEVY: May I address the Court?

THE COURT: Yes.

MR. LEVY: Thank you, your Honor.

I do want to point out some other problems with the non-cash part of the settlement.

When the complaint was filed, they asked for Ferrero to take the bad labels and jars off the shelf. That's not part of the settlement. We had a Campbell settlement before Judge Simandle, and the defendants did recall the Campbell soups with the bad labels. Here they can stay on the shelf.

Moreover, the images of the Nutella labels, as they appear on the TV ads, print ads, and websites, are going to stay the same with the same deceptive allegedly statements on them.

The commercials are being rotated off. Now, as your Honor knows, commercials get stale. They will be rotated off anyway. Now they are going to get rotated off; and in three years they could come back

in the present form under at the settlement.

So I think there are a lot of problems with the non-cash element of the settlement. I don't think they are worth very much at all.

One more thing.

Your Honor appears to be willing to cut the fees and treat that separately than the total settlement. That does not help the class at all, your Honor.

THE COURT: You are going back to whether we have a fair and reasonable settlement for the class. Think you made your arguments. I'm going to rule on that.

MR. LEVY: On the structure, the way the whole thing is structured.

THE COURT: Okay.

MR. LEVY: And let me say I've been doing this for 40 years. This is the First Class settlement I've objected to. There is a major issue here because there is very unique leverage here. The defendants had this California case -- basically, the same facts as the New Jersey case. The motion to dismiss was denied in California. There was a class certified just for the California consumers, which means they would have faced, and they were facing --

THE COURT: I don't want to deal with the California case. I can't tell you what I would have decided there. But I'm going to make some comments about the case itself and the claims and to the extent you -- I know that you wanted to be in New York. I'm going to just talk about the New Jersey Consumer Fraud Act. That's the only thing I have before me.

MR. LEVY: Right. And the point I was trying to make, and I did make it in the first few pages of my objection, is they were facing a federal suit in Florida, a federal suit in New York, a federal suit in California, a federal suit in New Jersey. The motion to dismiss in California has been denied. The class had been certified. They were in a very tough situation.

There is a lot of leverage on class counsel here because they needed a nationwide class, and they use that leverage to structure a settlement that did not benefit the class as much as themselves.

(Continued on the next page.)

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THE COURT: Thank you, Mr. Levy.

Mr. Guglielmo.

MR. GUGLIELMO: Your Honor, I'll start off by responding to Ms. Ades' counsel, Mr. Levy.

We reached a settlement in principle, as we set forth in our papers; and, as we told Mr. Levy before, the class was certified in California. He should check the dates.

Also, I guess he doesn't really appreciate, I guess, the fact that we have -- as the Third Circuit in De Beers recently recognized, you have an injunction which we are asking for to prohibit Nutella from utilizing the advertisements that were identified in our complaint, that were identified as part of the settlement agreement. If they go back and try to air those within the three-year period of the effective date, any class member or counsel, which we would do, would come in here and ask you to hold them in contempt. De Beers specifically recognizes that as some value.

In fact, in Mr. Levy's Campbell's case, he tried to get a temporary restraining order to prevent Campbell from further airing his ads, and he was unsuccessful. But in his settlement he has the same provisions we have here. I won't get into sort of the

hypocrisy of his objections.

To respond to Mr. Greenberg, he says in his objection that he did not find the statements on the labels or the advertising offensive in the first place. So if it was up to him, there wouldn't be a case here saying that the advertising was false and misleading.

The Williams v. Gerber case, which we have set forth --

THE COURT: By the way, it wasn't quite what he said.

MR. GUGLIELMO: He said he didn't find them offensive. If Mr. Greenberg or Mr. Langone don't think that the corrected or new advertising is somehow misleading now, they could simply file a new case if they like. There is no bar order, your Honor, to address that other issue prohibiting class members who would be purchasers in the future, obviously, because we have a defined class from 2008 to the date of preliminary approval in 2012. If the new ads come out, people think they are false and misleading, we or other lawyers could file another action.

With respect to the injunctive relief, which everyone seems to -- the objectors seem to argue is valueless, your Honor, I just want to point out that

we have obtained a complete cessation of the ads that we identified in the complaint. The three ads we identified were aired nationwide; and based on our allegations, we allege that those ads were false and misleading because they imply to consumers that Nutella was a healthy product when in fact all it is is a tool to enable moms and dads to get their kids to eat healthy foods.

So we have a cessation of the ads at issue. They can't make the representations that were in the ads. They can't re-air those ads for three years.

The statements on the labels we changed. We developed the changes in conjunction with Peter Wright, who was our advertising marketing expert who submitted a declaration. And, your Honor, I won't go into detail what Mr. Wright sets forth in paragraphs 14 and 15 when he talks about the changes on the labels and in the advertisement.

He talks about the television ads, and he says that the television ads avoid making an explicit or implied claim that Nutella is in and of itself nutritious, a nutritious addition to a breakfast. They have said: Confine the claim to the more valid representation that Nutella can be added to an nutritious breakfast to make it tastier and more

appealing to family members. These are part of his opinions.

THE COURT: I know those are his opinions. I'm not making findings today about what would have happened if that was the report going forward in the case. That's not the role I play. I understand those are there. Certainly, I appreciate that when you talk about what does an ad look like, is it deceptive or not, we can get into a lot of discussion, and we are not; and, as I made clear to the objectors, I'm not ruling on whether those ads are fair or not, whether they would survive a challenge. I'm making that clear to everyone today. I'm not being asked to rule upon that.

I think you've said it today. If someone wants to challenge those in the future because they think once they make their way to the market, that somehow they are violative of some statute, some rule, there is no ruling today that bars anyone from doing so. Ferrero has not bought that protection through this settlement. So that's clear as well. I put that out there.

Look, I've already said in my comments: Is this perfect injunctive relief? No. Are there better ways it could have been done, perhaps, as I said,

instead of involving plaintiff's counsel and Mr. Wright?

I think I've done this in other cases, in settling Lanham Act cases, using the -- what's that advertising agency? NAD? Using them would be a great way to go about it. That's not what you agreed to. I'm looking at what I've got today.

That's one of the ways of dealing with the advertising and agreeing to be bound by that. They are not taking product off the shelves.

By the way, that goes to the cost of this as well to them. You put out their numbers, and I'll address that in a little bit as well, what it's going to cost Ferrero. They don't have to remove any product. They are allowed to sell product. As they sell new product to retailers and it makes its way on the shelf, when the retailers exhaust its supply of inventory, that it makes its way, so that's not an extra cost other than the fact they have to make up new labels. They have to make up new labels for the existing language, too.

Commercials do get recycled. The same commercial doesn't air for two years generally. So at some point they would have been revamping commercials as well. So I will put out there -- and this will go

to the value of the injunctive relief and ultimately a fee, but that certainly, as well, the cost to Ferrero is not, I believe as you have represented, in the millions. Indeed, I have nothing in the record to support that, and I have nothing, obviously, because I have stricken the Johnson report as to the value.

So I am looking more at -- assuming that, assuming that there was unlawful advertising or labeling, assuming -- because we are not reaching a determination today, is there a value to injunctive relief that changes that in some fashion, that there is at least an argument, makes it clearer to the consumer what they are buying and what they are getting? That's where we are.

MR. GUGLIELMO: Your Honor, one brief comment in response to Mr. Greenberg's other arguments: The Merola v. Atlantic Ridgefield case, 515 F.2d 165, basically says that when you have non-monetary types of relief, the District Court must bring up an informed economic judgment to bear in assessing its value. In that instance, that case, the plaintiff's expert wasn't reliable in terms of calculating the value of injunctive relief was, so the District Court used his or her economic judgment and then valued it, and the Third Circuit said that was appropriate.

I think I've addressed Mr. Greenberg's and Mr. Langone's -- by the way, your Honor, one point on Mr. Langone.

As Mr. Cecchi said, they didn't properly set forth they were class members. The deadline to object has passed. So just for preserving the record, we would say whatever submission they put forth today is still untimely.

THE COURT: All right. Then I know there are objector arguments to the fees, both the percentage of the common fund as well as the fee being requested for the injunctive relief. I have papers on this.

Does anyone want to add anything else on the record?

Yes, Mr. Levy.

MR. LEVY: Your Honor, you apparently divided up approving the 2.5 million part and then addressing fees and probably reducing the fees.

Let me just tell you the fee reduction does not help the class the way this is structured. So I am urging your Honor to reject the settlement because you can't modify it so any reduction in the fees benefits the class.

If class counsel gets 1 million instead of 3 million, that 2 million gets added to what the class

gets; and then in the new settlement they are not restricted to the four jars. They would get a better benefit.

THE COURT: Frankly, this class is getting a good benefit. You can say better, maybe, in some hypothetical world. But I must tell you I have serious doubts whether this case would have survived motion practice under my reading of the New Jersey Consumer Fraud Act. I'm sure you have looked at some of the opinions I've written in this area. Maybe you haven't. You don't practice here in New Jersey. But I do take seriously the requirements under the Act and ascertainable loss and causation -- putting aside whether there was an unlawful conduct here, just put that aside for the moment without assessing the advertising was going to be a major impediment. I never got to the motion to dismiss because this was settled in the interim. I am telling you that under the New Jersey Consumer Fraud Act, and that weighs heavily here.

MR. LEVY: Two points, your Honor:

One, you appear to be saying it's such a weak case the class is lucky they got anything. If that's the case, they shouldn't have brought the case and they didn't deserve a fee for bringing such a bad

case.

THE COURT: You brought one, too.

MR. LEVY: And I disagree with your views of the case.

THE COURT: That's fine.

Look, I'm going to put this out there. I'm at the point now -- other than, perhaps, Mr. Greenberg who's already said: I don't want anything out of this; I was a purchaser; I'm basically a pro se lawyer objector here; I'm doing this on ideological grounds, or whatever else he may want to get out of this, what psychological goodies he wants, or in his practice -- but we are at the point of having other class action plaintiffs' counsel come in here who want something clearly for their clients as well or want an action on their own. I get that. But I will assess this, and I will do it in a reasoned opinion you will hear in a few moments. But I disagree strongly. And today, guess what? I'm the Judge.

MR. LEVY: Your Honor, you are always the Judge. Thank you.

THE COURT: Okay. Thank you.

Yes, Mr. Greenberg.

MR. GREENBERG: I would just like to echo that, your Honor. I just say, respectfully, there are

pretty profound Rule 23 concerns about the fairness, reasonableness, and adequacy of this largely because of what Bluetooth calls the kicker, the way that it's set up; so that even if there were a reduction in attorneys' fees, it still couldn't redound to the benefit of the class. I regard that as a very serious concern.

Of course, Bluetooth does as well. Bluetooth says that's a sign that class counsel has paid too much attention to its own interests and not enough attention to the interests of the class. There are other signs that are both contained in Bluetooth and in the settlement that suggests class counsel paid too much attention to its own interest and not enough attention to the interest of the class.

THE COURT: Mr. Greenberg, how do you deal with the fact, though, as I will ultimately opine, -- I think Mr. Levy put it right out there -- that this, I think -- and you really in your own papers suggested as well when you say: Who was fooled by these ads? -- that this is, I believe, a weak case.

So while everyone would like to say, Let's not put it in the pockets of the lawyers, -- and I may not be putting it in the pockets of the lawyers. You'll hear in a few moments -- but saying, Let's have that

redound to the benefit of the class, the question remains: What is fair to the class? And is what is being suggested as the fund fair to the class based on that assessment?

Thank you.

MR. GREENBERG: Did you want me to answer that or no?

THE COURT: I think that was kind of rhetorical on my part.

MR. GREENBERG: Thank you, your Honor.

MR. LANGONE: May I, briefly, your Honor?

THE COURT: Yes.

MR. LANGONE: I know the Court has obviously stated multiple times you've read the papers. I do want to address the reply on the Brytus and the Bogart cases, which is the Third Circuit precedence we cite about the use of the common fund doctrine as an equitable doctrine when counsel are being paid their lodestar in full, and in here, actually, getting a windfall on their lodestar, which is already coming in at these higher than usual rates.

THE COURT: I haven't ruled yet -- have I? -- on what they are going to get as their fee. I appreciate that's your argument if they were to get everything they requested.

MR. LEVY: Plaintiffs' counsel, class counsel, says these Brytus and Bogart cases actually support them because the agreement is not made pursuant to fee shifting, although the only plausible agreement that the defendant could make, other than, I guess, just giving out money to plaintiffs' counsel to pay a fee, would be pursuant to fee shifting.

So when there is fee shifting and there is a fiduciary duty to the class by class counsel, certainly I think it would be a breach of fiduciary duty to say to a client: I'm going to take my fee out of your portion rather than petition or achieve my relief under the statutory fee shifting.

So I don't think the Brytus and Bogart aid class counsel. I think they squarely hold that it would be unjust to take the money out of the class's fund when class counsel are getting paid. If the Court makes an award on the lodestar, that they would be paid in full or in excess of 1.8 million pursuant to the 3 million portion, then the class is not being unjustly enriched at anybody's expense. And since the common fund doctrine is solely an equitable doctrine to prevent unjust enrichment, it couldn't be applied to reduce the 2.5 million.

Also, the class was, in our position, not

given adequate notice of the fee petition against the 2.5 million. That might not apply to the fees requested as part of the injunctive relief because under 23(b)(2), they wouldn't necessarily need a notice for that.

THE COURT: The notice was adequate, and I will find that.

MR. LEVY: And then, finally, although the Court can't modify the agreement, I know from other cases courts have asked the defendant if they would agree to a modification of the condition of approving it, and we would ask that the Court see what the defendants' position is if the Court does reduce the 3 million fee, if the defendant is going to insist on enforcing that kicker provision or would the defendant allow that money, any reduction, to go to the class pot, as we believe would be proper. And, obviously, the Court can't red-line the settlement agreement but has to go up or down on that portion.

But there are cases where the defendant would agree as a condition of approval to make modifications, and we would ask that the defendant consider that, if that's the way the Court thinks it might be appropriate in this case.

Thank you very much.

THE COURT: Mr. Eggleton, he's inviting you to make a response.

MR. EGGLETON: Your Honor, Keith Eggleton again.

I'm happy to rest on the papers unless you have any questions for me.

THE COURT: You don't want to take up the invitation to add some money to the class?

MR. EGGLETON: I would put that under the heading: Everyone's got a better idea, your Honor.

I would like to say on the record it was a privilege to me personally to know Judge Politan. He did a good job on this case as he does on all cases.

Other than that, your Honor, I will rest on the papers.

THE COURT: Thank you.

Mr. Cecchi, do you want to address the fees?

MR. CECCHI: I do, your Honor.

I first want to say any class member who doesn't like this settlement, they can opt out. They don't have to submit a claim. They can just opt out of the settlement; and if Mr. Langone doesn't like it, he can have his clients opt out.

THE COURT: I don't think she's opted out as of yet.

MR. CECCHI: I don't think so. I mean, if it's such a bad deal, they shouldn't take it. They should go and do whatever they want to do.

You've heard a lot about the fairness of the monetary component. I want to first talk about the process and then ultimately what I think is the core issue for your Honor to decide on this fee.

First, the process was -- the core of this case was about the ads and the advertising, which we contended to be false and misleading, those ads at that point in time.

For better or for worse, we moved as fast as we could. We had some obstacles -- not only law, and unlike some others in the courtroom, I do practice in this jurisdiction. I do practice before your Honor. I am aware of your Honor's jurisprudence. And whenever you are trying to get a settlement or determining whether or not you are going to take a case to trial, you have to access the jurisdiction, the venue, the judge.

I was before your colleague, Judge Chessler, recently, and he said to me: You know, you're not before Judge Hochberg anymore. And let's be candid, because we're talking about fairness and we're talking about money. I passed Justice Brennan's portrait. If

you are before Justice Brennan, he's got a jurisprudence that's, let's say, to the left; you can assess the case differently than if you are before a judge you believe is more in the middle or slightly to the right. And I say that --

THE COURT: Although I take a little umbrage with the notion of putting this as a philosophy, Mr. Cecchi, left, right, or being liberal, about a different policy or a statute. What I think we are really talking about is, I've written on the area of New Jersey Consumer Fraud Act. I've written about ascertainable loss. But I take a little umbrage with the way you presented it.

MR. CECCHI: No, Judge, then my analogy is not a good one. Left, right, all I'm trying to say is: I know your Honor's jurisprudence, and as did Judge Politan. We assessed that. There are other judges in the district, is a better way of putting it, who have gone different ways. The Mercedes case: Slightly different analysis of the Consumer Fraud Act. So if my comments were not appropriate because I was just trying to make the point, I do know your Honor's jurisprudence.

So let's then talk about whether or not this is a good deal, a fair deal. On the monetary

component, it absolutely is. The way we negotiated this deal is, we focused on the injunctive relief. Your Honor came up with an idea about the NAD. I confess, we didn't think of that when we were negotiating the settlement. But we did think it was a good idea to have our expert review the future advertising. Whether or not anybody agrees or disagrees, that's for the future. But we felt that changing these ads was the heart and soul of this case because of our awareness of the risks. So we negotiated the injunctive relief. Then we negotiated a cash settlement, which, as it turns out, is hugely beneficial to the class.

And, again, Judge, I really do apologize for making a poor analogy. My point only was about risk. You have to assess your risk when you are coming up with a package. On that point, I can't be more humble than saying I didn't want to give umbrage to your Honor, and I hope you accept my sincere comments about it because I do feel a little emotional about this case, as I know your Honor does, because we worked hard on this case.

There were other lawyers in California who put a lot of obstacles in our path. There was an MDL proceeding. There were depositions. We worked with

our experts. So a lot of work did go into the case, and that gets to the point ultimately.

This injunction has value. It's a benefit to this class going forward. It has real value. We think it improved. Our expert did think it improved. Could it have been better? Absolutely. That's always the case in a settlement. It always can be better.

So, ultimately, all we ask your Honor is, even going back to your comments, which we started with about rates -- some of the rates are high, but you know various jurisdictions rates, we don't even have to focus on that. Because what I'm going to ask your Honor to do is just tell us what you think is fair for what we accomplished here, and, at the end of the day, we are comfortable with that. We accept that.

Do I think our request reflects a fair number that we negotiated after we negotiated everything else under Judge Politan's supervision? Do I think it's a fair compensation? Indeed, I do. I wouldn't have asked your Honor for it if I didn't think it was fair. But if your Honor doesn't think it's fair and reasonable, I respect that, I appreciate that, and we are going to live with that. But we take these cases. There is always risk in these cases getting nothing. And if the multiplier is two or three or 3 1/2 in the

cases, that's a reflection of the risk.

We've spent our own money on these cases, our own time, and sometimes we get nothing. I have been at that Larsen case for a long time, and we are going to be at this case for a long time afterward, your Honor, because these objectors, we know them well. We know them all. We know Mr. Greenberg. We know Mr. Langone. We will be litigating in the Third Circuit a year from now and even longer than that. I have been litigating the Larsen case for years, and the fee that you grant today, whether it's the full fee, which I hope we will get, or less, we will be working on this case in a year from now, and there will be no more payment to us.

So we achieved I think the best we could have in these circumstances. I think it's fair. And I think, ultimately, did we earn the fee that we requested? I think we did earn it. We all worked hard. We are all professional members of the bar. We are all good at what we do. And I do want to step back and, again, say, Judge, my comments are just that. I appreciated the risks. I knew this was a difficult case.

Do I think I could have convinced your Honor? Yes. But I thought that in other cases before your

Honor, too, and I was wrong in those cases; and you have to take that into consideration when you settle a case.

So I don't think I can say anything more other than I think we earned it. I think it's fair. I think, ultimately, that's the analysis your Honor has to undertake.

Thank you.

THE COURT: Thank you.

It's kind of interesting, Mr. Cecchi, when you said, too, We'll be litigating this a long time in the Circuit, frankly, this is the first time that I have had these objectors in one of my class action settlements, and I've never had an appeal taken from one of mine, but there is always a first, and I'm ready for it.

MR. CECCHI: I'm sure you are. I'm a betting man. I'm going to think whatever you rule there is going to be an appeal.

THE COURT: All right.

I have actually prepared fairly lengthy remarks, so sit back and relax.

Before the Court are motions by plaintiffs Marnie Glover, and I'll refer to her as "Glover," and Jayme Kaczmarek collectively, the "plaintiffs," to

certify the class and grant final approval of the parties' settlement pursuant to Federal Rule of Civil Procedure 23; and an application for an award of attorneys' fees; reimbursement of expenses; and approval of incentive awards pursuant to 23(h).

Defendant Ferrero USA, Inc., who I'll refer to as either "defendant" or "Ferrero" in this opinion, markets Nutella hazelnut spread.

Plaintiffs allege on behalf of themselves and a putative nationwide class, with the exception of those who purchased in California, that defendant deceptively marketed Nutella as a healthy food.

Defendant has joined plaintiffs in moving for final approval of the proposed settlement, and this settlement would resolve all claims asserted against defendant arising from plaintiffs' complaints.

The facts I am going to set forth now are based on the allegations in plaintiffs' complaints.

On February 27th, 2011, Glover filed an action in this district bringing claims on behalf of a nationwide class under the New Jersey Consumer Fraud Act: breach of contract and breach of express and implied warranty.

Plaintiffs' cause of action arises from her allegations that defendant deceptively marketed its

Nutella product as a healthy and nutritious component of a well balanced breakfast without explicitly stating that the true nutritional values come, instead, from the other foods or drinks -- for example, whole grain breads, fruit, and milk that are advertised along with Nutella.

Grover alleged that Ferrero made such representations in print, television, and point-of-sale advertising as well as on the label of the product to plaintiffs and other consumers during the class period.

On April 11, 2011, plaintiff Glover filed a motion with the Judicial Panel on Multidistrict Litigation requesting centralization of this action and a putative class action pending in California alleging similar claims. That was the In re Ferrero Litigation case in the Southern District of California. That motion was brought under 28 U.S.C. Section 1407 for pretrial proceedings in this district where Ferrero was headquartered and where it conducted the majority of the activities complained of in the actions. That received MDL No. 2248.

The motion for centralization was denied following oral argument held on July 28, 2011, and the panel found as follows -- and I'll quote from their

opinion at 804 F. Supp. 2d 1374:

"The actions may share some factual questions regarding the common defendants' marketing practices, but these questions do not appear complicated. Indeed, the parties have not convinced us that any common factual questions are sufficiently complex or numerous to justify Section 1407 transfer at this time."

In the interim, on May 2, 2011, the plaintiffs in the Southern District of California action, Athena Hohenberg and Laura Rude-Barbato, who I'll refer to as "proposed intervenors," sought to intervene in the Glover action for the purpose of having it dismissed. Glover opposed that motion.

Meanwhile, Ferrero filed a motion to dismiss pursuant to Rule 12(b)(6).

While those motions were pending, plaintiff Kaczmarek filed her complaint on July 26, 2011, asserting similar claims based upon the same conduct alleged in Glover's complaint.

On August 23, 2011, Kaczmarek sought consolidation of her complaint and Glover's complaint with the appointment of Scott & Scott LLP and Carella, Byrne, Cecchi, Olstein, Brody and Agnello, the Carella firm, as interim lead counsel.

On September 6, 2011, the Court granted the request for consolidation under the caption: "In re Nutella Marketing and Sales Practices Litigation," and appointed Scott & Scott and Carella as interim lead counsel. I'll refer to them as "class counsel for the putative class."

The Court terminated defendant's motion to dismiss and set deadlines for plaintiffs to file a consolidated complaint and for defendant to refile its motion to dismiss thereafter.

On September 9, 2011, proposed intervenors filed a second motion to intervene for the purpose of filing a motion to dismiss both the Glover and Kaczmarek actions pursuant to the first-filed rule.

The Court denied both motions to intervene on October 20, 2011.

During this time, the parties agreed to mediate before the late Honorable Nicholas J. Politan, a former United States District Court Judge in the District of New Jersey. These sessions resulted in the settlement which is before the Court today.

On January 10, 2012, plaintiffs filed a motion for preliminary approval of the settlement. I granted that motion and preliminarily certified the class and approved notice to the class.

The terms of the settlement are memorialized in the class action settlement agreement, and the Court has reviewed those terms in full.

The putative class is defined as "all persons throughout the United States who purchased one or more of defendant's Nutella brand hazelnut spread products in any state other than California at any time from January 1, 2008, through the date of preliminary approval, February 3, 2012, the class period, other than for resale or distribution.

"Excluded from the settlement class members are Ferrero, defense counsel, any judge presiding over any of the actions that together comprise the actions or related actions, or any immediate family members of any such persons."

The settlement is divided into two parts: money payment to the class for alleged past damages and an injunction related to Nutella's marketing and advertising to prevent alleged future harms.

Under the terms of the settlement, the parties have agreed that defendant will pay $2,500,000 for distribution to settlement class members who submit a valid claim form.

Settlement class members can submit a claim for up to $4 per jar purchased during the class period

up to a maximum of five jars for a total of $20 subject to pro rata reduction based on the total number of claims filed.

Second, the parties have agreed to address the advertising the plaintiffs allege is deceptive. Defendants will revise its labeling and print and media advertising to reflect the changes agreed to as well as modify the content on the website for Nutella. In particular, defendant is revising Nutella's label by adding more nutritional information on the front of the package regarding sugar and fat content of the serving.

It is changing its slogan from "An example of a tasty yet balanced breakfast" into "Turn a balanced breakfast into a tasty one." These changes are to last at least two years.

In addition, defendant will not use potentially misleading commercials for three years and has revised its commercials based on input from class counsel. Defendant has altered its website removing information plaintiffs allege was potentially misleading.

Plaintiffs submitted a declaration by Peter Wright who claims to be an expert on consumer behavior and marketing practices. Mr. Wright opines that

Ferrero's new advertising campaign "will effectively educate reasonable consumers about how to do practical, balanced and nutritional breakfast planning which may or may not include Nutella." Wright declaration at paragraph 13.

The Court appointed Rust Consulting -- I'll refer to it as "Rust" -- as the claims administrator. Through Rust's efforts, notice of the claim and settlement were published in the following magazines: Parents, the May 2012 issue; People, April 16th, 2012 issue; Ser Padres, May 2012 issue; and Women's Day, May 2012 issue -- which were the same magazines that ran defendant's allegedly deceptive advertising campaign.

In addition, notice of the claim and settlement were published on the following websites: 24/7 Real Media Network, Parenting Channel, and Facebook.

Rust also established a dedicated settlement website, the Settlement Website, WWW.Nutellaclassactionsettlement.com, which contains the settlement agreement, class notice, and information relating to filing a claim on that, opting out of the settlement, objecting to the settlement, deadlines relating to the settlement, frequently asked

questions, and other information relative to the settlement. The settlement website also contains an electronic claim form to allow an online submission of claims as well as a claim form which can be downloaded, printed, and mailed to the claims administrator. The website is in both English and Spanish.

It also includes the declaration of James Cecchi in support of counsels' motion for approval of fees, which included declarations from each of plaintiffs' attorneys' fees regarding the hours and fees they claim to have accrued.

In response to the publication, the settlement website has been viewed over 1 million times, the internet banner notations have been viewed well over 10 million times, and over 200,000 individuals have filed claims for 962,137 jars of Nutella. At $4 a jar, the total amount of claims filed by June 29, 2012, would equal well over $3 million.

Of the entire class, only six individuals requested exclusion from the class. A number of objections have been lodged as well, which the Court addresses in turn.

I know that at this point as well that a number of the objectors had complained about the

cy-près provision in the settlement which would have allowed any remaining funds not collected by the class to be distributed to a charity. Those objections are, however, moot because its clear the class fund will be exhausted due to the number of claims filed.

As this case has not proceeded to the class certification stage, the Court has to first determine whether to certify the settlement class. The Court has already conditionally certified the class. The Third Circuit in In Re Insurance Brokerage Antitrust -- I'm going to leave out the actual cites; I'll just give the name of the case for purposes of the opinion on the record -- explained the standard for class certification in a settlement context.

In order to approve a class settlement agreement, "a district court must determine that the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b) are met and must determine that the settlement is fair to the class under Federal Rule of Civil Procedure 23(e)." See also Sullivan v. DB Investors. Inc., 2011 U.S. App. Lexis 25185, at 3839 (3d Cir. February 23rd, 2012.)

As the Supreme Court has made clear: "Confronted with a request for settlement only class certification, a district court need not inquire

whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of Rule 23, those designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention in the settlement context." Amchem Products v. Windsor.

"If a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed." Thus, it is important to "apply the class certification requirements of Rule 23(a) and (b) separately from the fairness determination under Rule 23(e)." In re Prudential Insurance Company of America Sales Practices Litigation Agent Actions (3d Cir. 1998.)

"The requirements of Rule 23(a) and (b) are designed to ensure that a proposed class has 'sufficient unity so that absent class members can fairly be bound by decisions of class representatives.'" That's the Prudential case quoting the Amchem Supreme Court case.

Under Rule 23(a), the prerequisites to class certification are:

One, the class is so numerous that joinder of all members is impracticable;

Two, there are questions of law or fact common to the class;

Three, the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

Four, the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a); and see Amchem.

"If all the prerequisites of Rule 23(a) are satisfied, a class action may be maintained if the standards set forth in Rule 23(b) are satisfied as well." In re Insurance Brokerage at page 257, Rule 23(b).

Rule 23(b) requires "The Court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Amchem at 618. "Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device."

The "factual determinations necessary to make Rule 23 findings must be made by a preponderance of

the evidence. In other words, to certify a class, the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." In re Insurance Brokerage at 258. Accordingly, "class certification is proper only if the Court is satisfied after a rigorous analysis that the prerequisites of Rule 23 are met."

"Even if it has satisfied the requirements for certification under Rule 23, a class action cannot be settled without the approval of the Court and a determination that the proposed settlement is fair, reasonable, and adequate." In re: Prudential Insurance Company. See Federal Rule of Civil Procedure 23(e)(2) stating that "A district court may approve a proposed settlement only after a hearing and finding it is fair, reasonable, and adequate."

In In re: Insurance Brokerage, the Third Circuit affirmed the applicability of nine factors establish in Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), which are to be considered when determining the fairness of a proposed settlement.

"Where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, we require district courts to be even more scrupulous than usual

when examining the fairness of the proposed settlement." In re Warfarin Sodium Antitrust Litigation (3d Cir. 2004).

As stated earlier, the parties request that the settlement class consist of all persons except those in California who purchased Nutella between January 1, 2008, and February 3, 2012.

I'll address first the numerosity requirement.

First I determine whether plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Rule 23(a).

With respect to numerosity, a party may not precisely enumerate the class members to proceed as a class action. In re Lucent Technology, Inc. Securities Litigation, 307 F.Supp.2d 633, (District of New Jersey 2004).

"No minimum number of plaintiffs is required to maintain a suit as a class action. But, generally, if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met. Stewart v. Abraham (3d Cir. 2001) citing Moore's Federal Practice. Also, Leesberg v. Converted Organics (D. Del 2010).

Here the numerosity element is easily satisfied. No one disputes that defendant sold

perhaps millions of jars of Nutella throughout the United States during the period. In addition, over 200,000 individuals have filed claims. Therefore, joinder of all class members is impractical.

Turning to commonalty.

Commonalty requires that "there are questions of law or fact common to the class." The threshold for establishing commonalty is straightforward. "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." In re Schering Plough (3d Cir. 2000), quoting Baby Neal v. Casey (3d Cir. 1994).

Indeed, as the Third Circuit pointed out, "It is well established that only one question of law or fact in common is necessary to satisfy the commonalty requirement despite the use of the plural 'questions' in the language of Rule 23(a)(2)." In re Schering Plough, note 10. Thus, there is a low threshold for satisfying this requirement. Newton v. Merrill Lynch (3d Cir. 2001) and In re Asbestos Litigation (3d Cir. 1986).

"Highlighting the threshold of commonalty is not high. It is not required that all putative class members share identical claims." See Hassine v.

Jeffes, 846 F.2d 169 (3d Cir. 1988), and Baby Neal, stating that "Factual differences among the claims of the putative class members do not defeat certification."

Here the Court finds that there are common questions of law or fact shared amongst the class. Importantly, all members of the class were subject to either defendant's deceptive advertising campaign or allegedly misleading label and purchased at least one jar of Nutella.

All members of the class also share common questions of law -- in particular, whether they were exposed to allegedly deceptive or fraudulent messages regarding defendant's advertising and labeling, whether such deceptive messages, if any, caused them to buy Nutella, and, if so, whether they were harmed.

A number of objectors dispute plaintiffs' underlying claim that the messages, even if deceptive, caused them to purchase the product or caused them any harm. This, of course, goes to the merits of the claims and the damages, if any.

Nonetheless, the members of the class share the common questions of whether the label and/or advertising were unlawful. As such, the element of commonality is met.

Turning to typicality.

"The concepts of commonality and typicality are broadly defined and tend to merge because they focus on similar aspects of the alleged claims. Newton v. Merrill Lynch (3d 2001). Specifically, Rule 23(a)(3) requires that "the claims of the representative parties be typical of the claims of the class." Rule 23(a)(3).

Typicality acts as a bar to class certification only when "the legal theories of the named representatives potentially conflict with those of the absentees." Georgine v. Amchem (3d Cir. 1986) and Newton.

"If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." Newton at 184.

In other words, the typicality requirement is satisfied as long as representatives and the class claims arise from the same event or practice or course of conduct and are based on the same legal theory.

As discussed above, because plaintiffs' claims arise from the same course of conduct and are predicated on the same legal theories as the claims of all other members of the class, the allegedly

deceptive marketing and labeling of Nutella, the typicality requirement of Rule 23(a)is satisfied.

Turning to adequacy of representation.

Class representatives must "fairly and adequately protect the interests of the class." 23(a)(4). This requires a determination of, one, whether the representatives' interest conflict with those of the class, and, two, whether the class attorney is capable of representing the class. Newton at 187.

The Supreme Court has stressed that this element "serves to uncover conflicts of interests between named parties and the class they seek to represent." Amchem at 625."

"Rule 23(a)'s adequacy of representation requirement serves to uncover conflicts of interest between named parties and the class they seek to represent." In re Pet Food Products Liability Litigation (3d Cir. December 16, 2010), quoting Amchem.

Class representatives "must be part of the class and possess the same interests and suffer the same injuries as the class members." This element also functions as a catch-all requirement that "tends to merge with the commonality and typicality criteria

of Rule 23(a)," citing to Pet Foods.

The named plaintiffs are adequate representatives for the class. Each has alleged that she was exposed to defendant's allegedly deceptive marketing and that such marketing caused her to purchase Nutella and suffer an ascertainable loss. In that regard, like all members of the class, plaintiffs faced the same challenged practices.

In addition, there is no evidence that plaintiffs have any interests that are antagonistic to or in conflict with the class. As such, the absent class members' interests will be protected adequately. See In re Warfarin Sodium Antitrust Litigation (3d Cir. 2014). Moreover, having reviewed class counsel's resume, the Court is satisfied that the Carella firm and Scott are experienced in prosecuting class actions on behalf of consumers.

Nevertheless, objector Christopher Andrews, who is not present here today, argued that class counsel has not adequately represented the class. Indeed, to some extent, I guess, Mr. Levy made the argument today as well. But Mr. Andrews complains that the settlement here is not as favorable as the one reached by counsel in the California action.

After reviewing the proposed settlement of the

California action, I find it is substantively similar to the settlement before me in this matter. Both include a monetary payment for past harm and an injunction related to defendant's marketing and the content of the Nutella label. The only significant difference is the amount of the payment and valuation of the injunction as that class only pertains to persons in California. So the amounts are naturally smaller than those here, where the class is defined as all persons in the United States.

In addition, the California settlement has largely identical provisions to those before me and was made a week after the settlement here.

Furthermore, class counsel here have indicated that California counsel tried to hinder settlement in this matter.

It has also been demonstrated to this Court that Mr. Andrews has been working with California counsel against class counsel here. As will be discussed later, I note here that Mr. Andrews seems to have objected only for the purpose of obtaining a significant payment from the fund or class counsel.

A number of other objectors complain regarding class counsel's fees, but not necessarily the fairness of the settlement itself. These concerns are outside

the ambit of this factor, and I will address them in turn. I find that Andrew's objection has no merit.

Accordingly, the Court finds that class counsel will adequately represent the interests of plaintiffs and the class.

Turning to the superiority requirement.

In addition to meeting the requirements of Rule 23(a), the class must also satisfy Rule 23(b)(3). That requires that "a class action be superior to other available methods for the fair and efficient adjudication of the controversy."

The rule sets out several factors relevant to the superiority inquiry:

A, the interests of members of the class in individually controlling the prosecution or defense of separate actions;

B, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

C, the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

D, the difficulties likely to be encountered in the management of a class action.

Essentially, the superiority requirement "asks

the Court to balance in terms of fairness and efficiency the merits of a class action against those of alternative available methods of adjudication." Prudential at 316; In re Warfarin, 532, 33.

In this case, each of the factors weighs in favor of class certification.

First, the expense of individual actions in this consumer fraud action weighed against the potential recovery would clearly be cost prohibitive. Here, individual plaintiffs have alleged losses amounting to several dollars for each Nutella jar they purchased. Plaintiffs' allegations represent the high point of what they could hope to achieve individually. This is far too small of a potential recovery for any individual class member to be expected to pursue his or her own claim in a separate action.

In addition, to meet the requirements of Rule 23(b)(3), named plaintiffs must show that common questions of law or fact predominate over questions affecting only individual class members. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation and assesses whether a class action would achieve economies of time, effort and expense and promote uniformity of decision as to persons

similarly situated." Sullivan, 2011 U.S. App. Lexis at 41.

In determining whether common questions predominate, courts have focused on the claims of liability against defendants. See Bogosian v. Gulf Oil (3d Cir. 1997.) Indeed, the Third Circuit recently explained that "the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members and whether all of the class members were harmed by the defendant's conduct." Sullivan at 44.

Here, as stated earlier, common legal and factual questions are shared amongst the class members and plaintiffs in this action. Specifically, class members and plaintiffs challenge the same alleged improper consumer practices by defendant. As such, there are no significant individual fact issues. Rather, the determination of the legal issues raised involve a "common nucleus" of operative facts that underlies all of the claims asserted in this case.

Accordingly, the factual and legal principles to be addressed by plaintiffs in prosecuting these claims are sufficiently common to the entire class, thereby satisfying the predominance inquiry. See Amchem at 625.

"Predominance is a test readily met in certain cases alleging consumer or securities fraud."

(Continued on the next page.)

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Having weighed all the factors and considered the requirements of class certification, the Court finds that it is appropriate to certify the class for settlement purposes.

In determining whether, then, to approve the class settlement, this Court is bound by Rule 23(e). "Under Rule 23(e), the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. The Court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." In re GMC Pick-Up Truck Fuel Tank Products Liability Litigation (3d Cir. 1995).

In general, the law encourages and favors settlement of civil actions in federal courts, particularly in class actions. In re Warfarin at 535. See In re General Motors (3d Cir. 1995).

"The law favors settlement particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."

Accordingly, when a settlement is reached on terms agreeable to all parties, it is to be encouraged. Bell Atlantic V. Bolger (3d Cir. 1993).

Nevertheless, a class action settlement may

not be approved under Rule 23(e) without a determination by this Court that the proposed settlement is fair, reasonable, and adequate. See In re Cendant, 264 F.3d at 231; 23(e)(1)(A); and Amchem, 623, noting that the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." And when settlement negotiations precede class certification and approval for settlement and certification are sought simultaneously, the Third Circuit requires district courts to be even "more scrupulous than usual" when examining the fairness of the proposed settlement. See General Motors at 805.

This heightened standard is intended to ensure that class counsel has engaged and sustained advocacy throughout the course of the proceedings, particularly in settlement negotiations, and has protected the interests of all class members. See Prudential at 317.

To ensure fairness, the Third Circuit has identified nine factors to consider when determining whether a proposed class action settlement is fair,

reasonable, and adequate; and these are, as I referenced before, the Girsh factors, and they are as follows:

One, the complexity, expense, and likely duration of litigation;

Two, the reaction of the class to the settlement;

Three, the stage of the proceeding and the amount of discovery completed;

Four, the risks of establishing liability;

Five, the risks of establishing damages;

Six, the risks of maintaining the class action through the trial;

Seven, the ability of defendants to withstand greater judgment;

Eight, the range of reasonableness of the settlement fund in light of the best possible recovery; and

Nine, the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

The Court has considerable discretion in approving a proposed settlement of a class action; and in light of these principles, the Court will determine whether this settlement is reasonable.

Addressing the first factor, the complexity, expense, and likely duration of the litigation.

The first factor involves a consideration of the "probable costs in both time and money of continued litigation." In re Cendant at 233. The Court finds this factor weighs in favor of settlement.

It has already been determined, even by the Judicial Panel on Multidistrict Litigation, that this case does not involve complex issues. Nevertheless, it would involve discovery, trial preparation, and addressing various legal and factual issues. Therefore, this litigation, like all civil litigation, has the potential to be both time consuming and expensive for the parties. Additionally, expert discovery would be necessary, and there would be the potential need for surveys and extensive analysis of consumer conduct relating to the allegedly deceptive marketing.

If the case were to proceed to trial, there would be significant motion practice. Defendant had already filed a motion to dismiss although it was terminated with leave to refile after the cases were consolidated. Because defendant has been steadfast in its assertion that its message was never deceptive or fraudulent, it would undoubtedly refile its motion to

dismiss; and if the case were to proceed beyond that, then it would likely file summary judgment motions as well.

Finally, the post-trial motions and appeals process would further extend the length of the litigation.

Accordingly, a significant amount of money and resources would be required to pursue this litigation to a final judgment which would ultimately delay any potential payout to the class. As such, this factor favors settlement although not significantly more so than any other civil litigation matter.

Second, the reaction of class members.

As indicated, there are at least hundreds of thousand of class members nationwide. To date, the Court has received 17 objections, although a number of the objectors are related in some fashion; and distilled to their essence, there are about eight groups of objections. These objections will be addressed later in this opinion. In addition, six individuals have requested exclusion from the class. A number of objections have been made strenuously, but much of the ire is directed towards the attorneys fees and not the class settlement itself.

For the purpose of this factor, the few

objections made to the underlying settlement from the class members as compared to the potential number of class members creates a presumption that this factor weighs in favor of settlement. In re Cendant at 235.

"The vast disparity between the number of potential class members who received notice of the settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the settlement." Indeed, under Girsh, such a small number of negative responses favors approval of a class action settlement. See Stoetzner v. U.S. Steel Corp, (3d Cir. 1990).

"Objections by 29 members of a class comprised of 281 strongly favors settlement." In re Prudential Insurance. "Small number of negative responses to settlement favors approval." Weiss v. Mercedes Benz. 100 objections out of 30,000 class members weighs in favor of settlement. Clearly our numbers here are even more skewed.

Turning to the stage of proceedings and the amount of discovery completed.

This factor "captures the degree of case development that class counsel have accomplished prior to the settlement. Through this lens courts can determine whether class counsel had an adequate

appreciation of the merits of this case before negotiating." In re Cendant at 235. Even settlements reached at a very early stage and prior to formal discovery are appropriate when there is no evidence of collusion and the settlement represents substantial concessions by both parties. Weiss, 889 F.Supp. 1301.

This case has been litigated for about a year and has involved some discovery. The parties have engaged in extensive motion practice regarding proposed intervenors' motion to intervene and defendant's motion to dismiss. In addition, the parties have propounded document requests and interrogatories, issued third-party subpoenas, reviewed over 50,000 pages of documents, hired experts, and taken two depositions.

Finally, and most importantly, the parties have prepared for and partook in mediation before the late Honorable Nicholas Politan in October and November 2011. Therefore, the Court finds that class counsel had sufficient information to make an informed decision regarding settlement. This factor weighs in favor of approval.

Turning to the risks in establishing liability and damages.

The fourth and fifth factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefit of an immediate settlement." In re Warfarin at 537.

In other words, those factors attempt "to measure the expected value of litigating the action rather than settling it at the current time." Cendant at 237 through 239. Both factors strongly weigh in favor of approval of settlement in this case.

Here plaintiffs have a difficult row to hoe in proving their case. Defendant had filed a motion to dismiss; and although the Court never had the opportunity to rule on it, a review of the arguments suggest there were significant impediments to plaintiff recovering under their theories.

First, it is questionable whether defendant did anything relating to its advertising campaign that amounted to unlawful conduct, although the Court notes allegations relating to defendant's labeling might have presented a more colorful issue. But even there, issues were raised as to preemption and FDA labeling requirements. Moreover, even if any unlawful conduct could be shown, plaintiffs still had to prove defendant's conduct caused plaintiffs to purchase the

product and that plaintiffs suffered an ascertainable loss in so doing.

Both issues presented obstacles. Considering the basic consumer understanding that Nutella is essentially a hazelnut chocolate spread, even many of the objectors note they never bought the product based on health claims. One must wonder how plaintiffs would have established liability. Further, to show an ascertainable loss, plaintiffs would likely have to point to a comparable product of which there were few, if any, at the time, and take into consideration the benefit that plaintiffs nevertheless received from buying Nutella.

In addition, factoring into the Court's determination is both class counsel and Ferrero's representation, with which this Court agrees, that the expected recovery to the class is well within the range of reasonableness in light of the best possible recovery, possible setoffs, and attendant risks of litigation.

Accordingly, given the real and extensive risks involved in this case for plaintiffs, these two factors weigh heavily in favor of the approval of the settlement. See, for example, In re Suprema Specialties. "Approving settlement where plaintiffs

would have difficulty establishing liability and damages." In re Genta Securities Litigation.

Next, turning to the risks of maintaining the class action through trial.

The Third Circuit has explained that this factor tends to be neutral because "under Federal Rule of Civil Procedure 23(a), a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable," and proceeding to trial would always entail the risk even if slight of decertification. In re Cendant at 239.

Accordingly, the Court finds this factor is neutral or slightly weighs in favor of the settlement.

Turning to the defendant's ability to withstand a greater judgment.

This fact addresses whether defendants "could withstand a judgment for an amount significantly greater than the proposed settlement. In re Cendant at 240.

In this case, there is no real dispute that Ferrero has the ability to withstand a greater judgment. However, this factor is generally neutral; whereas, here the defendant's ability to pay greatly exceeds the potential liability and was not a factor in settlement negotiations.

In addition, even if a defendant could withstand a greater judgment than the amount of the settlement, this finding alone is insufficient to reject the term of a settlement. Cendant at 240.

Accordingly, the Court finds that this factor stands neutral.

Turning to the range of reasonableness of the settlement.

The last two factors evaluate whether the settlement represents a fair and good value for a weak case or a poor value for a strong case. In re Warfarin at 558.

"In conducting this evaluation it is recognized 'settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution, and courts should guard against demanding too large a settlement based on the court's views of merits of the litigation." In re Safety Components and In re AT&T Corporate Securities Litigation at 170. In that case, the Court found that settlement was an "excellent" result in light of the risk of establishing liability and damages despite the fact settlement possibly represented only 4 percent of the total damages claim.

The Court is satisfied that in light of the

fact that plaintiffs have a real risk of proving their claims, these two factors weigh strongly in favor of approving settlement for the reasons I've already described. In particular, even if liability were established and damages were provable, such damages would likely represent a small fraction of the purchase price.

A plaintiff must plead ascertainable loss "with enough specificity as to give the defendant notice of possible damages." Torres-Hernandez v. CVT Prepaid Solutions (D.N.J. 2008).

As one court in this district recently explained, "What New Jersey courts require for loss to be 'ascertainable' is for the consumer to quantify the difference in value between the promised product and the actual product received." Your case, Mr. Levy, Smajlaj v. Campbell Soup, 782 F.Supp. 2d 84 at 99 (D.N.J. 2011).

No one disputes that there is value in the Nutella product, perhaps significant value, and that the original price of Nutella was on the order of several dollars. The parties predict that after fees and costs, claimants will likely receive approximately $1.35 per jar up to five jars. If anything, this is at the high end of the expected recovery. The measure

of recovery for plaintiffs and for the class, if any, would be only a portion of the price paid for a jar. This amount, therefore, is well in line with that outcome. Therefore, these factors weigh strongly in favor of proving of the settlement.

Having weighed all the factors, the Court finds the class settlement is fair, reasonable, and adequate pursuant to Rule 23(e).

I will turn to adequacy of notice.

A number of objectors have complained about the adequacy of the notice. The reasonableness of the notice is governed by Rule 23(h). Like so many aspects of the class action, the touchstone of the question is "reasonableness." In particular, Rule 23(h) requires "that notice of the motion of class counsel for attorneys' fees and non-taxable costs must be directed to class members in a reasonable manner." The rule does not necessarily require such motion to be served on class members but, rather, that it be directed to them in a reasonable manner.

As I stated, the Court appointed Rust as class administrator. Rust published notices in the same publications in which defendant had advertised Nutella. It published internet banners on popular websites, and set up a settlement website that

provided important documents for the class, information on how to file a claim or other options available for a class member, such as objecting or opting out of the class, providing answers to frequently asked questions, and contact information for additional questions. The website received over 1 million hits, and the contact number received over 1500 calls. Over 200,000 claims were filed for nearly 1 million jars of Nutella. In addition, the cases received extensive media attention.

Based on this, I find that the method of notice was reasonable and comports with the requirements of Rule 23(h). See In Re: Ravisent Technologies, Inc.: Securities Litigation, approving of notice similar to that provided here over objections.

Some objectors complained that not enough information was provided detailing the hours class counsel devoted to the case and the fees they incurred. While the Court agrees that there was a paucity of information regarding counsel fees, which I will discuss in a bit, that does not affect whether the notice was reasonable. Although perhaps presented in a cursory fashion, counsel did post the same declarations regarding their fees on the settlement

website that were provided to this Court. McDonough v. Toys-R-Us, Inc., 2011 U.S. Dist. Lexis 150851 (E.D. Penn. December 20, 2011), finding that a failure to post any information regarding class counsel's fees was unfortunate but not fatal. Notice is not required to be perfect, only adequate. Rule 23(a) does not require that a notice contain every specific detail related to the settlement. In re Brokerage Antitrust Litigation (D.N.J. March 30, 2012).

The notice here was reasonable and adequate based on the present circumstances.

I'm going to turn to attorneys' fees and expenses.

All the named plaintiffs' attorneys including class counsel join in the request for an award of attorneys' fees and reimbursement of expenses incurred in this litigation. The award of attorneys' fees concerns two separate aspects.

First, plaintiffs' counsel are requesting 30 percent of the gross amount of the monetary settlement plus reasonably incurred expenses of $78,888 to be paid out of the 2.5-million-dollar award to the class.

Second, based on the injunctive relief obtained, which plaintiffs described as significant, plaintiffs are requesting an additional award of

$3 million. I will address these separately because each aspect is valued differently, although objectors stress that in combination class counsel are seeking 68 percent of the total recovery paid by defendant.

The Court understands plaintiffs' argument, that it is only seeking about 30 percent because of the way it values the injunction, and that its fees should be based on that putative value combined with the $2.5 million monetary settlement. Objectors point out, however, that out of all money defendant is being asked to pay under the settlement, and that is the number, the $5.5 million, they argue which would include the $3 million fee requested, class counsel are seeking over $3.8 million of it, or 68 percent.

The Court must analyze the attorney's fee provision under Rule 23(e) in much the same fashion as the settlement itself. "Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'"

The district court has the discretion to amend or modify the award of attorneys' fees. "The amount of the award of attorneys' fees and expenses is

controlled by the Court and is within its sound discretion." In re Computron Software (D.N.J. 1998), citing In re GMC Pick-Up Truck Litigation, out of the Third Circuit. "A district court is not bound to the agreement of the parties to the amount of attorneys' fees."

Attorneys' fees are typically assessed through the percentage-of-recovery method or through the lodestar method. The percentage-of-recovery method applies a certain percentage of the settlement fund. See Welch & Forbes, Inc. V. Cendant (3d. 2001).

The lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services. In re AT&T at 164. In common fund cases, such as this one, the percentage-of-recovery method is generally favored because "it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" In re Corporate Securities Litigation (3d Cir. 2005), quoting In re Lucent Technologies.

However, the Third Circuit has recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award. The cross-check is performed by

dividing the proposed fee award by the lodestar calculation resulting in a lodestar multiplier. When the multiplier is too great, the Court should reconsider its calculation under the percentage-of-recovery method with an eye toward reducing the award. The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method. In re AT&T at 164.

When analyzing a fee award in a common fund case, the Court considers several factors, many of which are similar to the Girsh factors, as I previously described. See Rite Aid at Note 9. These include:

One, the size of the fund created and the number of persons benefitted;

Two, the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;

Three, the skill and efficiency of the attorneys involved;

Four, the complexity and duration of the litigation;

Five, the risk of non-payment;

Six, the amount of time devoted to the case by plaintiffs' counsel; and

Seventh, the awards in similar cases.

The list is not exhaustive.

In Prudential, the Third Circuit noted three other factors that may be relevant and important to consider:

One, the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations;

Two, the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time that counsel was retained; and

Three, any innovative terms of settlement.

The fee award reasonableness factors "need not be applied in a formulaic way" because each case is different, "and in certain cases one factor may outweigh the rest." Rite Aid at 301.

The Court may give some of these factors less weight in evaluating a fee award. Moreover, the analysis of the Gunter factors overlaps with the Girsh factors used to assess the appropriateness of the settlement. In that regard, I will refer to my earlier findings when reviewing this fee application.

Let me turn to the lodestar analysis being

used as a cross-check.

I will address counsel's submissions regarding the time spent and fees spent. These submissions have been provided to aid the Court in performing a lodestar calculation that is used as a cross-check to confirm the reasonableness of the fee request.

At the outset I note that the parties have been litigating this matter for less than a year, and while some discovery has taken place, it does not appear to have been especially extensive. Two depositions were taken. Several third-party subpoenas were issued. Some written discovery was propounded. Experts were hired. Documents were collected and reviewed. Plaintiffs note that 53,000 pages of documents were produced. At first blush, this number might sound significant. But I must note that in the modern age of electronic discovery, civil class action cases can involve millions of documents, let alone pages.

A significant amount of counsel's time was also spent fighting with the proposed intervenors about which venue was most convenient or most appropriate.

In addition, the parties participated in an involved mediation process which resulted in this

settlement. Plaintiff's counsel submits these tasks have involved nearly 3,000 hours at a cost of over $1.8 million in fees and costs.

Five firms have submitted declarations regarding the hours they have spent on this matter representing plaintiffs, their billing rates, and some brief explanation of their experience. Based on the declarations attached to plaintiffs' motion for attorneys' fees, plaintiffs' counsel have spent 2,982 hours and purportedly generated $1,796,402.75 in fees and $78,888 in costs.

Let me just stop for one moment on the costs because there was also some reference there might be additional costs incurred during this process.

MR. CECCHI: I think, given your Honor's ruling as to those costs, we would not seek reimbursement of those costs.

THE COURT: Because I assumed that was with regard to the Johnson matter.

MR. CECCHI: Correct, your Honor.

THE COURT: And I was going to tell you that you would not be permitted to do so.

Unfortunately, there is no detail provided with these submissions. Rather, counsel has submitted spreadsheets showing total hours spent multiplied by

individual attorney rates. The Carella firm's submissions at least divide hours spent based upon the type of litigation or representation, such as pleadings, motion practice, discovery, et cetera, but that is as much detail as is afforded to the Court. None of the other firms have gone that far.

I have no means by which to gauge if the time was reasonable, if the time was spent working on successful billable matters, whether the time was duplicative of other counsel's work, nor am I convinced that the charged rates are all necessarily reasonable.

I've already had this during my argument with counsel. I noted the declaration of Mr. Davis that said he and his partner, Dan Taliaferro, are attorneys in Alabama and charged $700 per hour, which he claims to be well within the market rate. I had questioned whether that was truly the market rate in Alabama. Mr. Davis noted in court today, because he has provided no information that would corroborate that statement about the Alabama area, but he said that essentially it is what he charges in similar types of contingent fee cases, but there would be a lesser amount if it were at a different hourly rate.

I also questioned the hours. Mr. Davis said

he and his partner spent 700 hours to "zealously assist" in this matter by "investigating, research, drafting pleadings, editing pleadings, discovery, taking depositions, management of office staff." His declaration at paragraph 5.

While Mr. Davis assisted in filing the Glover complaint and perhaps assisted in some motion practice, I note that his firm was not appointed as class counsel; and if, indeed, Mr. Davis spent nearly 700 hours on this matter doing all the activities he suggests, I'm not sure how much was left over for the other attorneys to do. Yet, Scott & Scott, with whom Mr. Davis worked, says it spent nearly 1,780 hours on many of the same tasks, and that's the Mr. Guglielmo declaration.

It would appear to this Court that a significant number of hours are potentially duplicative. But based on the paucity of information provided, I cannot determine the reasonableness of these accrued fees with any sense of accuracy. This is not to say counsel are required to provide the Court full details of every 10th of an hour spent on a case, but here, where there are five firms and each is claiming a significant amount of time has been spent on a relatively straightforward matter that was

settled in less than one year after commencing the case and before defendant had answered or had its motion to dismiss ruled on, or even before a consolidated amended class action complaint had been filed, significantly more information would need to be provided before the Court can say with any certainty that the lodestar calculation is reasonable.

Based on that, I do not find counsel's submissions helpful in calculating a lodestar amount other than to set the ceiling on the fees that the attorneys accumulated.

Now I turn to the first aspect of the attorney's fee request, which is the reasonableness of the request for 30 percent of the $2.5 million monetary settlement.

Although there is no general rule, the Third Circuit has observed that fee awards in common fund cases range from 19 percent to 45 percent of the settlement fund. Generally, a third is on the high end of what counsel is able to recover, and some courts have found that a reasonable fee award is generally to be around 25 percent of the fund.

Without even considering what plaintiffs are asking for, based on the injunctive relief, a 30 percent recovery by itself is significant. Class

counsel are both firms of national repute and, by all measures, did an excellent job in representing their clients and received a fair and reasonable settlement, and perhaps even generous settlement, considering the risks and merits or lack thereof of the case. That does not, however, justify the high percentage award in this case for the reasons I've already discussed.

This was not a complex case. The case took less than a year from when it was filed to when it was settled. Only a small measure of discovery was performed relative to other large-scale civil litigation class actions. Much of the time was spent between class counsel in this matter and counsel in the California action squabbling about where the case should be brought. The case never proceeded beyond the early stages of litigation.

While defendant's motion for dismissal under Rule 12(b)(6) was fully briefed, it was terminated after the case was consolidated, and class counsel was given leave to file a consolidated complaint, which was never done because of settlement tasks. Against this backdrop, I will analyze the factors.

Starting with the size of the fund created and the number of persons benefitted.

As the Court has already noted, claims for

over 900,000 jars of Nutella were filed at the end of June, and the class was set to close on July 5, 2012. Counsel seeks to recover 30 percent of the gross fund in fees in addition to $78,888 in costs leaving, a remaining balance of $1,587,000.

Claims for nearly a million jars had been filed within a week remaining before the claim period closed.

The parties initially agreed the class should receive up to $4 per jar; yet, after counsel's fees and costs, it would leave the class approximately 41.60 per jar. Plaintiffs theorize that after all claims are filed and additional costs and interest are taken, the class will receive approximately $1.30 per jar. While this might represent a fair payout for the class, based upon the allegations and the chance of recovery, it is significantly less than what may have been anticipated or bargained for in the settlement.

Furthermore, the junction purportedly protects against future harms by addressing plaintiffs' allegations as to misleading marketing and labeling. In that sense, the number of people potentially benefitted is large. But as I will discuss in a few moments, the Court is suspect about the overall benefit of the injunctive relief, and it does not

directly redress any harm allegedly suffered by the class itself. Therefore, it does not affect the number of class members benefitted.

Thus, I find that this factor would support a reduction in the amount of fees.

Looking at the presence or absence of objections.

As I've already indicated, there are a number of objections. Plaintiffs asked the Court for additional pages in its briefing because of the extent of the objections. Both parties note that many of the objections are directed not at the monetary settlement itself but at the amount of fees the attorneys are seeking. Those same objections will be discussed by this Court in a moment with regard to the injunctive relief.

In this regard, the presence of some meaningful objections is probative in determining the appropriate fee. See Rite Aid and In re AT&T.

Turning to the skill of class counsel.

To measure the quality of counsel, courts must examine the result achieved, the difficulties faced, and the speed and efficiency of the recovery, the experience and expertise of counsel, and the performance and quality of opposing counsel. Milliron

v. AT&T (D.N.J. 2009).

In this case class counsel negotiated a valuable settlement within a reasonable amount of time since the start of the litigation. Because of their timely efforts, the class will benefit more. Had this case proceeded further, it would result in a greater expenditure of fees and costs and perhaps an eventual dismissal.

The Court finds that this factor weighs in favor of approving a significant award of attorneys' fees but not necessarily the amount that class counsel seeks.

Turning to complexity and duration and duration of litigation.

I analyzed that with the Girsh factors. The claims against Ferrero were not complex. Without reciting of the Court's previous findings on this issue, the Court, nonetheless, finds that by successfully negotiating a settlement and with excellent counsel representing Ferrero, the class counsel provided the class with a benefit at this juncture. But because of the circumstances already discussed, such as the early stage at which the litigation was settled, the relatively small amount of substantive work required of and performed by counsel,

this factor weighs in favor of approving a reduced amount of attorneys' fees.

Turning to the risk of nonpayment.

With regard to non-payment, there is no dispute that Ferrero is in good financial standing and could withstand a sizeable judgment. Thus, that factor is neutral.

Turning to the amount of time devoted to the litigation.

Class counsel say that they have devoted significant time to this litigation, nearly 3,000 hours. As I have already commented, the Court questions how so many hours could have been spent by so many firms on a case that was not yet a year old when it settled and had yet to proceed past the nascent stages of litigation. Still, counsel undoubtedly spent a significant amount of time litigating and did so on a contingency basis, and without any guarantee of success or award, yet managed to negotiate a very favorable settlement that will benefit the class members.

The Court concludes that these efforts, although, I think, overstated by counsel, weigh in favor of a reduced but significant fee award.

Turning to awards in similar cases.

The comparison of the fees sought by class counsel with fees awarded in recent class actions militates in favor of reducing the requested 30 percent fee. As I have discussed, courts have broad discretion in reviewing attorneys' fee awards, and the award of 30 percent is generally a sizeable award with 25 percent being a more typical result in a case such as this. Because of the factors and analysis I have already undergone, the Court finds that the percentage of the fund attorneys' fees should be reduced from 30 percent to 25 percent.

Based on the posture of the case, the time when the case was filed to settlement, the relatively few substantive issues involved, the Court exercises its discretion and thus reduces the recovery from 30 percent of the common fund of $2.5 million of the gross amount to the 25 percent which yields a fee of $625,000.

Turning next to how I should value the injunctive relief.

I find that it should be assessed based on the common benefit it confers on the members of the class. "The key consideration in determining a fee award is reasonableness in light of the benefit actually conferred." The Court must be cautious in awarding

value to an injunction. "Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." McCoy v. Health Net, Inc. (D.N.J. 2008).

In McCoy, the court approved counsel's valuation finding that the injunction imposed a "14.5 percent increase to the allowable amount paid by defendant health insurance company which bestowed a sizeable financial benefit." But courts have reduced or denied approved attorneys' fees where there is a minimal benefit to the class because of the injunction or it has dubious value.

In Schwartz v. Dallas Cowboys Football Club out of the Eastern District of Pennsylvania, the district court found that the valuation of the injunctive relief was too high and the value conferred was too low to either approve the settlement or the high amount of attorneys' fees sought by plaintiff's counsel.

In In re HP Inkjet, the settlement agreement was valued at $1.5 million, combining the value of nontransferable credits and the injunctive relief. That was out of the Northern District of California, a

2011 case. Counsel sought approximately $2.3 million along with $600,000 in costs. The Court reasoned that "the extent to which an attorney's fee award exceeds the value of the settlement to the class is problematic." The Court went on stating that "To allow the award of attorneys' fees to outstrip the benefit to consumers in such cases would undermine the importance of focusing the efforts of class action counsel on issues that most affect consumers." The Court granted a reduced fee award to class counsel in that case.

As I ruled before, I have struck the Johnson report offered by plaintiffs' counsel. Therefore, there is nothing in the record to support class counsel's valuation of the injunction. Nevertheless, plaintiffs' counsel argued that the injunction is worth a substantial amount because it forces defendant to spend millions on redesigning their label and advertising campaign. But that is not the way to measure the injunction.

As I said before, an injunction should be valued based on what value it provides to the class and not what cost it imposed on the defendant. The injunctive relief does not provide the class with as substantial a benefit as class counsel suggests. The

class is defined as individuals who have already purchased Nutella, allegedly have been harmed by it, and now know of any potential deception related to the nutritional value of Nutella. Therefore, relatively little value can be derived by the class based on defendant's future action.

Further, even if I were to consider the costs to defendant, they are likely much less than plaintiffs suggest. Certainly, defendant must incur costs in creating new labels, halting its ad campaign, and creating new marketing. But the changes to the Nutella's marketing are generally minor, and the injunctive relief does not require defendant to replace products already on store shelves.

Therefore, there are no replacement costs to factor in. Defendant would still need to place labels on future Nutella products with or without the injunction, and several of the objectors have raised this point as well.

Additionally, while it will cost defendant to rework their advertising campaign, there is nothing to suggest this would not have happened without the injunction. Defendant has experienced successful product growth based on advertising, and it is very likely that defendant would have intended to continue

advertising. But companies continually revamp their advertising, particularly television commercials, and there is nothing to suggest that defendant would not have incurred this cost or a similar cost but for the injunction.

This, however, does not mean that there is no value to the injunction, only that I find it has been significantly overvalued by class counsel. A number of the objectors argue that even going forward, the injunction does very little because individuals have no more reason to be deceived now than they did previously.

For example, defendant agreed to put ingredient information, fat and sugar content, et cetera, on the front of the label even if such information is already on the back. Objectors say that if an individual were concerned about this information, then she would have known to check the label, and the injunction therefore provides little practical effect. But these arguments also go to the merits of the litigation itself and whether Nutella was actually marketed fraudulently or not.

Assuming the merits of the claims, defendant has agreed to change its label, although it does not have to replace products currently on the shelf. It

has agreed to stop airing potentially misleading advertisements, and to provide more information regarding the product's sugar and fat content. These address the primary concerns raised by plaintiffs in their complaints.

To the extent anyone was deceived by the earlier marketing, there is less chance that will occur in the future as a result of the injunction.

Some objectors also complain that class counsel will only have advisory input into the new advertising campaign. To some extent, this objection is moot as defendant and plaintiffs have agreed to the language to be used.

Also, the class received some benefit from the injunction because it goes to the harms alleged in plaintiffs' complaints. Plaintiffs not only sought monetary redress but also to prevent future harm and fraud. The injunction helps to achieve that goal even if the risk was slight to begin with. Therefore, the class receives some benefit although significantly less that what plaintiffs estimate.

Because I find that the injunction has some value, but that it is significantly below class counsel's assessment and not ascertainable based upon the submissions made, I will award a fee for the

injunctive relief but in an amount substantially less than what has been requested.

Considering class counsel's combined two fees, one based on the injunctive relief and the other from the common fund, convinces me further that a significant reduction in the counsel fees requested is appropriate. A recent case from the Ninth circuit is instructive although not binding. A number of objectors cite to this opinion. In In re Bluetooth the court vacated the district court's approval of a settlement agreement that awarded the class $100,000 but set aside about $800,000 for class counsel.

The Court shared a concern that other courts have expressed, "warning that 'private agreements to structure artificially separate fee and settlement agreements' should not enable parties to circumvent the 25 percent benchmark requirement." That's from In re Bluetooth quoting In re General Motors Corp (3d Cir. 1995).

"Even when technically funded separate, the class recovery and the agreement on attorneys' fees should be viewed as a 'package deal.'" That decision focused on whether there was the appearance of collusion between the parties, which I do not find is an issue here, but the case is still instructive.

Class counsel is receiving a significant amount of fees but in an amount that more accurately reflects the work and time involved and the value of the injunction.

I am going to award for the injunctive relief a fee in the amount of $500,000.

Finally, in recognition of their services to the class, each named plaintiff is entitled to a payment. $2,000 has been requested for each of those named plaintiffs under of the terms of the settlement. Courts routinely approve awards to compensate named plaintiffs for the service they provide and risk incurred during the course of the litigation.

Plaintiffs request $2,000, and I find the only one objecting to that was Mr. Andrews, but I do find it is reasonable. I will award the $2,000.

I'm going to go through each of the objections separately even though they have been largely incorporated in my comments.

First addressing the Attorney General of Texas.

Assistant Attorney General Jim B. Cloudt has lodged an objection on behalf of the state of Texas through the Attorney General of Texas and based on the fact that the certified class includes Texas

residents. Mr. Cloudt does not oppose the monetary settlement itself but, rather, the efficacy of the proposed injunctive relief and the size of the injunctive fee award.

I have already dealt with those concerns in this opinion and, therefore, I think I do not need to make any further comment about it.

Mr. Greenberg raises a number of points in his objection. Sylvia Bader has joined in Mr. Greenberg's objection. Primarily, Mr. Greenberg objects on the grounds that the settlement unfairly overcompensates class counsel and perhaps to the detriment of the class. He argues, first, that the benefits in the injunction are illusory, and counsel cannot sustain its argument that should be valued at 3 million. He does not argue, unlike the other objectors, that the monetary settlement did not achieve enough for the class. He is willing to forego any recovery for his purchase and asserts he objects only on the principle that class counsel should not receive the lion's share of the recovery.

I had, to some extent, already agreed with that and reduced both a percentage of the recovery from the monetary settlement as well as significantly reduced the injunctive fee award. I do not agree with

Mr. Greenberg that there is no benefit to the class based on the injunction, as I've already indicated.

Amy Ades lodged an objection through her counsel. She is a named plaintiff in another consumer fraud action against Nutella out of the Southern District of New York. Mr. Levy appeared here today on her behalf. She objects: The settlement is inadequate, the notice was defective, the fee requests are excessive. And, frankly, it's only as to the last point that I have had some agreement. The settlement is fair, reasonable, and adequate.

As I have explained, plaintiffs did not have an easy case, and Ms. Ades would have likely faced many of the same difficulties as her New York action. It is not clear if plaintiffs could establish any of the elements of the consumer fraud claim or their related breach of warranty claims. And if they had, they would have only been able to recover a portion of the purchase price. This is what Ms. Ades would be allowed to recover under the settlement. She was, of course, free to exclude herself from the class.

And I also find, as I've already stated, that notice was adequate, and I will not repeat my findings there.

Robert Falkner and Christine Streeter, through

their counsel, have lodged an objection. They object to the extent of the attorneys' fees and believe more should have been given to the class, and, in particular, object to the extent of the injunctive fee award. I have already made my findings in that regard and incorporated them into my findings here as well as the arguments being made with regard to combining the injunctive fee with the monitor settlement award.

Also, there was an objection with regard to the cy-près provision, which is moot.

The Sibley objectors -- Katie Sibley, Daniel Sibley, Gary Sibley, Sherri Johnson, Janis Johnson, and Jenny Iriarte -- are from Texas, and they have filed very similar or really identical papers; collectively, the Sibley objectors. Gary Sibley is an attorney at the Sibley firm and filed a more formal objection. These objections are being discussed as a group as they appear to be related both in form and in addition to some of the objectors appearing to be familially related.

First, the objectors complained about the cy-près provision. That is moot.

Next, they complained about the size of the monetary settlement fund and the amount of attorneys' fees. I've already dealt with those concerns as well

as what could have been recovered here both based on the risks of liability and damages, and that only a portion of the amount paid for Nutella could have been recovered, and that is what has been achieved.

Chris Hampe objects to the settlement because he believes the common fund attorneys' fees in combination with the injunctive fee award is grossly excessive. I've already dealt with that.

The Bochenek objectors -- Agatha Bochenek, Brandon Goodman, and Edward Hagele -- have lodged an objection through counsel. At the outset, I note that when we entered court, none of them attested to being part of the class. A representation was made here today by Mr. Langone that they now have declarations stating that they are. They would have had no standing or basis to object.

They complained about the information provided regarding the fee request or time records. As I have noted, class counsel has provided submissions with little detail; and while I had concerns about that, that really goes to the lodestar which is a potential cross-check against reasonableness and did not have a bearing on my final analysis.

They also complained about collusion between the parties. This settlement, as have I stated now

numerous times, was reached during a mediation before former District Judge Politan, and there is no reason to believe that any collusion occurred under the careful scrutiny of that well-respected jurist.

They also complained of the notice of the settlement and the fee request. I've dealt with these as well. I think there is also as well, then, nothing new in their objections that need to be separately addressed.

Let me address Chris Andrews, who is not here. Chris Andrews filed a 100-page objection. The Court finds Mr. Andrews, no surprise to anyone, appears to be a professional objector who has extorted additional fees from counsel in other cases through his objections or threats to object, and has as well based upon a submission made to this Court done so in this case.

In his objections he states that he has spent 140 hours investigating this case and expects to be paid more than $25,000 because class counsel failed to perform their job. On page 84 of his objection, he states: "If I don't get paid, I will appeal and make new case law or have a new law written."

Mr. Andrews is certainly within his rights to pursue an appeal if he is not satisfied with the

results. He had an opportunity to opt out and pursue his own litigation, but he is not entitled to extort money. I reviewed his entire objection and find it wanting. Large parts of his brief are plagiarized from those of other objectors, such as Mr. Greenberg, or appeared to be copied from websites. The points he does make are better made by other objectors, are concerns the Court had without the benefit of Mr. Andrews' briefing, or are entirely without merit. Much of his objection involves trying to determine Nutella's full sales figures from online research and sifting through court documents.

Mr. Andrews believes he or the class is entitled to a significant share of defendant's revenues.

He also wants a 10 percent finder's fee for any increase in the class fund. There is no legal basis for the argument about receiving a share of the defendant's revenue.

Recovery, if any, would have only been a portion of the price paid for the Nutella. He stated he bought one 26-ounce jar of Nutella. The settlement will allow him to recover a portion of the purchase price which is precisely what he would have recovered had he brought his case individually.

He is not entitled to the defendant's profit.

All his arguments are without merit.

That concludes my findings.

I'll need an order.

MR. CECCHI: We will provide an order, your Honor.

I just wanted to note, particularly on that last point, although Mr. Andrews did not come today, we received additional emails, which I would like to make part of the record in the event that Mr. Andrews brings the matter up to our brother on the Third Circuit. We got some this morning.

THE COURT: Because I had one last week that came to you that was provided to me.

MR. CECCHI: Correct. We got one this morning that was of the same tenor. So I would like to make that part of the record.

The other thing I would like to say is, first, I think on behalf of plaintiffs' counsel, and, I know, defendant's counsel, we appreciate the effort your Honor put into this matter. There were a lot of procedural motions and other filings that your Honor had to deal with -- this was not today's hearing -- deal with, all these objections. I know it's not easy, and we wanted to thank your Honor for the effort

you put in.

I also wanted to note that although in some aspects we had a different view, it was an excellent opinion, and I'm going to get the transcript and use it in the future on some of the issues your Honor addressed, and so we thank you for your effort.

THE COURT: Let me say, and I said it throughout the opinion, because this is my last opportunity to speak on this and because we do have counsel for some of the objectors present here, as well as one of the objectors himself, that this really was an excellent result understanding what this case was about. Let there be no mistake about it. Perhaps I'll just leave it at that.

MR. CECCHI: We appreciate that, your Honor, because we felt the same way.

Thank you.

MR. EGGLETON: Thank you very much, your Honor.

THE CLERK: All rise.

(Proceedings concluded.)

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C E R T I F I C A T I O N

PURSUANT TO SECTION 753, TITLE 28, USC, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

VINCENT RUSSONIELLO, CCR
OFFICIAL U.S. COURT REPORTER

C E R T I F I C A T E

I, **Vincent Russoniello**, Official United States Court Reporter and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.

S/Vincent Russoniello
Vincent Russoniello, C.S.R.
Certificate No. 675
Date: July 17, 2012

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust Litigation	Case No. 1:10 MD 2196
	ORDER GRANTING SANCTIONS
This document relates to: ALL DIRECT PURCHASER CLASS ACTIONS	JUDGE JACK ZOUHARY

Pending before this Court is the Indirect Purchaser Class ("IPC") Motion for Sanctions (Doc. 2107). Objector Andrews opposed (Doc. 2108) and IPC replied (Doc. 2110). Objector Andrews also filed an unauthorized sur-reply, characterized as a supplemental response (Doc. 2111).

While IPC's Motion was pending, the Sixth Circuit denied Andrews' petition for rehearing *en banc* (Doc. 2110-1, Ex. A). Andrews filed a Request to Stay the Mandate (Doc. 2109) with the Sixth Circuit, noting he planned to file a petition for writ of certiorari with the United States Supreme Court. The Sixth Circuit previously advised Andrews in its June 2016 Order dismissing his appeal that no mandate would issue (Doc. 2110-4, Ex. D). It confirmed this fact in an October 2016 letter (attached) responding to Andrews' stay request. This means there are no more avenues for Andrews to delay this litigation on appeal, and this Court now turns to the Motion at hand.

Andrews failed to post an appeal bond as previously ordered by this Court (Doc. 2068), resulting in dismissal of his appeal by the Sixth Circuit (Doc. 2100). In so doing, the Sixth Circuit noted (*id.* at 3):

> Professional objectors, such as Andrews, may not disrupt the settlement process based on nothing more than unsupported suppositions. . . . [His] objections to the settlements lack merit, his appeal has the practical effect of prejudicing the IPC by delaying the disbursement of settlement funds, and he offers no proof of financial hardship that would justice his failure to post the bond.

This Court's authority to sanction Andrews is found in 28 U.S.C. § 1927, which reads as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

See also Gitler v. Ohio, 632 F. Supp. 2d 722, 727 (N.D. Ohio 2009) ("Although § 1927 on its face limits who may be sanctioned to an attorney or other person allowed to conduct cases, courts in the Sixth Circuit can sanction *pro se* litigants under that provision").

If there were any doubt whether to order a sanction, and there is none, one need look no further than Andrews' most recent and unauthorized "supplement" filing (Doc. 2111). Beyond the improper filing, the substance -- or lack thereof -- once again reflects Andrews' unreasonableness: claiming as he does, without factual or legal support, that IPC counsel, not he, deserves sanctions. Quite the opposite. Enough already with these repetitive, warmed-over, and meritless arguments.

This Court agrees with the IPC that Andrews continues his vexatious use of the judicial system and does so either to extort a pay-off from the IPC or as a delay tactic to prolong his coercion attempt. This Court further agrees that Andrews has delayed this case far too long and has ignored both this Court's Orders and rulings from the Sixth Circuit.

While this Court declines to impose the panoply of sanctions suggested by the IPC, this Court does find favor in the request that Andrews be penalized for the amount of interest that has been lost

to the IPC due to his frivolous filings. That amount, from April 2016 through October 2016, totals $15,303, with interest continuing to run until payment is made in full.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

October 24, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: POLYURETHANE FOAM ANTITRUST LITIGATION	)	MDL Docket No. 2196
	)	Index No. 10-MD-2196 (JZ)
THIS DOCUMENT RELATES TO:	)	Hon. Jack Zouhary
INDIRECT PURCHASER CLASS	)	

INDIRECT PURCHASER CLASS' MOTION FOR SANCTIONS
AND INCORPORATED MEMORANDUM OF LAW

Indirect Purchaser Plaintiff Class ("IPP" or the "Class") moves this Court for an order imposing sanctions on Objector Christopher Andrews ("Andrews") pursuant to 28 U.S.C. §1927 as follows: (1) monetary sanctions against Andrews; and (2) to enjoin him from making any filings in this litigation without first obtaining Court approval, and in support of this motion state:

INTRODUCTION

As more fully discussed in Section I below, as a threshold matter this Court has jurisdiction to order sanctions against Andrews, even though his *en banc* petition is pending in the Sixth Circuit Court of Appeals. *Val–Land Farms, Inc., v. Third National Bank In Knoxville*, 937 F. 2d 1110, 1117 (6th Cir. 1991). Because Andrews' repeated filings in this Court and in the Sixth Circuit have been found to be frivolous and without merit, this Court should impose sanctions on Andrews, pursuant to 28 U.S.C. §1927 for the undue delay and proliferation of this litigation and the damage he caused to the Class.

Notwithstanding this Court's approval of the parties' settlement of the case ***nine months*** ago, the Class has not been able to recover a single penny of their long-overdue $151,250,000 settlement monies due to a single, frivolous objector. Andrews has single-handedly prevented finality of the Settlements via his myriad of baseless motions and appeals. Moreover, he has managed to hold the Class hostage while flagrantly violating orders of this Court and the Sixth Circuit Court of Appeals with impunity. While this case is currently pending before the Sixth Circuit on Andrews' latest frivolous petition for *en banc* review, ***this Court has jurisdiction to and should sanction Andrews now*** to put an end to his egregious conduct.

As this Court knows, more than six months ago the Court ordered that Andrews was required to post a $145,463 appeal bond as a condition to Andrews' continuing to pursue his frivolous objections on appeal. In issuing the bond, this Court concluded that, as compared to the other handful of objectors that had engaged in vexatious conduct, "Andrews is the worst," finding that he had advanced "scurrilous, unfounded accusations" and "repeatedly made baseless accusations using inappropriate language" about Class counsel, this Court and the Sixth Circuit Court of Appeals. (Doc. # 2065) The Court further concluded that Andrews' arguments on appeal (which mirrored his frivolous objection advanced to this Court) were, "even under the most charitable view of the merits of Objectors' arguments," highly unlikely to succeed on appeal. *Id*. at 6-7*; see also id*. at 16 ("To now have Objectors file frivolous appeals in pursuit of a payoff is not simply a detriment to the settling parties—it is an insult to the judicial system.").

That bond order, and repeated subsequent orders mandating that Andrews post such bond, have simply been ignored by Andrews, as he has continued to press his frivolous objections on appeal without penalty or sanction. Instead, Andrews filed ***six*** separate ***failed*** motions or pleadings attacking the bond—three of which were filed in this Court and three in the

Sixth Circuit—all of which were based on groundless assertions that the Court had already expressly and repeatedly rejected. When the Sixth Circuit dismissed Andrews' appeal for failure to post the bond, it found that "Andrews' objections to the settlements lack merit, [and] his appeal has the practical effect of prejudicing the IPC by delaying the disbursement of settlement funds…" *IPC v. Andrews*, Case No. 16-3168, Doc. # 38-1 at 3 (6th Cir. June 20, 2016). Indeed, the Class has lost at least $13,086.30 in interest from April 2016 through September 2016, due to the delayed disbursement of funds, in addition to the costs and additional attorneys' fees (for which Class Counsel is not at this time including in this motion for sanctions) by having to respond to Andrews' incessant, meritless filings. *See* Doc. # 2042-5 at 4. The Class will seek further sanctions against Andrews if he persists in causing further delay through his frivolous filings. The calculation of lost interest for months after September 2016 are set forth in [Doc. # 2042-5 at 4]. The Class will also seek attorneys' fees for services in connection with Andrews' conduct in continuing to prosecute his frivolous appeal.

In dismissing Andrews' appeal, the Sixth Circuit allowed Andrews fourteen days from the date of that dismissal to post the required bond if he wanted to further pursue his appeal. Andrews did not do so, choosing instead, without posting a bond, to file a petition for *en banc* review with the Sixth Circuit, in which he continued to press the merits (or lack thereof) of his objections to the settlement. Andrews has essentially acknowledged that his pending *en banc* petition is meritless and unlikely to be granted as he has already threatened Class Counsel with a further certiorari appeal to the United States Supreme Court. [*See* Doc. # 2102 and Ex. A, Email from C. Andrews to M. Miller dated September 15, 2016]. And as Andrews has just recently made clear, he intends to follow through on the filing of an undeniably frivolous petition for a

writ of certiorari, and further delay the resolution of this litigation and payment of proceeds to the Class for many more months.

The Class cannot continue to suffer at the expense of this vexatious, extortionate litigant. The time is ripe for this Court to sanction Andrews monetarily, and also enjoin him from making any further court filings in the action without the Court's prior approval.

I. The Court Has The Authority And Jurisdiction To Impose Sanctions While the Case is Pending Appeal.

As a threshold matter, this Court has jurisdiction to enter sanctions against Andrews, even though the case is currently pending on appeal and is subject to potential additional appeals. *See Val–Land Farms, Inc., v. Third National Bank In Knoxville*, 937 F. 2d 1110, 1117 (6th Cir. 1991) ("Our circuit has held that a district court retains jurisdiction to entertain a motion for…sanctions even after the filing of a notice of appeal"); *see also Reg'l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 156 (6th Cir. 1988) ("The district court retains jurisdiction to resolve a motion for attorneys fees or sanctions even while an appeal of the merits is pending in the court of appeals.").

28 U.S.C. § 1927 provides that "any…person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In particular, those who file "unfounded, unmerited, and unsuccessful motions for reconsideration simply because they disagree with a ruling, decision, or order should expect to be sanctioned to the full extent permitted under…28 U.S.C. § 1927." *Miller v. Norfolk Southern Rwy. Co.* 208 F.Supp.2d 851, 854 (N.D. Ohio 2002); *see also Great Lakes Towing Co. v. Kornmeier*, 299 F.Supp.2d 793, 794-95 (N.D. Ohio 2014) (sanctioning counsel for filing a motion for reconsideration on the basis

that "the hour I spent in reviewing the motion, my former order, and writing this order is an hour wasted for no useful purpose, and an hour taken from the several other matters awaiting my attention").

Accordingly, the Sixth Circuit and the Northern District of Ohio have imposed sanctions under §1927 on litigants that unreasonably multiplied case proceedings under circumstances far less egregious than those here. For instance, courts in this Circuit often award fees under §1927 for *single* instances of sanctionable conduct, as compared to the *half dozen* duplicative motions filed here on a bond issue that had already been repeatedly and expressly rejected in this case. *See, e.g. Nollner v. Southern Baptist Convention, Inc.*, 628 Fed.Appx. 944, 950-51 (6th Cir. 2015) (upholding sanctions of "reasonable attorneys' fees" under Section 1927 on the basis that counsel "intentionally and needlessly caused additional expense to" party by filing an "untimely and unfounded motion"); *Liberty Legal Foundation v. National Democratic Party*, 575 Fed. Appx. 662 (6th Cir. 2014) (affirming order issuing sanctions where counsel brought a single suit that was promptly dismissed and "knew or reasonably should have known that the claims in the case had no basis in law" and "were without merit"); *Thurmond v. Wayne County Sheriff Dept*. 564 Fed. Appx. 823 (6th Cir. 2014) (affirming sanctions where counsel "unreasonably and vexatiously multiplied proceedings" by filing an "unviable and duplicate" complaint that caused the opposing party to "incur unnecessary expenses in defending against the new action by filing a motion to dismiss and a motion for sanctions, before [the] counsel finally stipulated to dismiss the complaint"); *Velocys, Inc. v. Catacel Corp*., 2011 WL 4945291 (N.D. Ohio 2011) (imposing

sanctions for statements made by a party and his counsel, during a single hearing, "without any factual basis," even though they were not "intentional misstatements").[1]

In addition to monetary sanctions, §1927 authorizes a court to enjoin a vexatious litigant where he has wasted judicial resources. "Every paper filed with the Clerk of ... Court, no matter how repetitious or frivolous, requires some portion of the [Court's] limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *In re McDonald*, 489 U.S. 180, 184 (1989). "The goal of fairly dispensing justice ... is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *In re Sindram*, 498 U.S. 177, 179–80 (1991). Where a litigant has engaged in such waste, the court may enjoin him from submitting motions or pleadings in a case by ordering the court's clerk to not accept any such filings without the court's express prior approval. *See Walker v. Heideman*, 229 F.3d 1155, *1 (6th Cir. 2000)

[1] *See also Coniglio v. CBC Services*, Inc. 2013 WL 3776179 (N.D. Ohio 2013) (imposing sanctions where counsel refused to name what they knew was a necessary party to the matter and opposed that party's intervention in the matter); *Thompson v. Moore*, 2011 WL 3289728 (N.D. Ohio 2011) (imposing sanctions where party filed suit with claims that he knew "were frivolous in that he made no discovery requests and filed an untimely response to Defendant'' dispositive motion for judgment on the pleadings due to 'inadvertent oversight'"); *Steele v. City of Cleveland*, 2010 WL 2760396 (N.D. Ohio 2010) (imposing sanctions where "plaintiff "has failed to carry [her] burden by adducing evidence" and "prosecut[ed] a pointless appeal"); *Joe Solo Productions, Inc. v. Dawson*, 2009 WL 3055204 (N.D. Ohio 2009) (imposing sanctions where party filed suit in court without jurisdiction and "consciously rejected several opportunities to correct his erroneous impression"); *Dixon v. Clem*, 492 F.3d 665 (6th Cir. 2007) (affirming trial court's imposition of sanctions *sua sponte* where counsel "press[ed] specious legal claims and filings in this case which either contained inappropriate language, claims and assertions (requiring unnecessary responses) or which were inappropriate" and counsel "continued to make personal attacks" despite being warned by the Court that his actions were improper"); *Moore v. International Broth. of Elec. Workers*, Local 8, 2003 WL 22722931 (N.D. Ohio 2003) (imposing sanctions after the court dismissed plaintiff's frivolous suit and cautioned "plaintiff from continuing to pursue this litigation, either in this court or on appeal," but plaintiff failed to heed the court's warning).

(citing *Filipas v. Lemons*, 835 F.2d 1145, 1146 (6th Cir. 1987)) ("[T]he district court did not abuse its discretion in directing the clerk not to accept for filing any additional papers tendered by Walker in this action."); *Hulen v. Polyak*, 2 F.3d 1151, *1 (6th Cir. 1993) (affirming district court order "in which the court held that it would not consider any further submissions by Mrs. Polyak to relitigate any issue regarding the parties or the property involved in the partition sale."); *Polyak v. Boston*, 4 F.3d 994, *1 (6th Cir. 1993) ("The district court did not abuse its discretion by ordering that no further submissions with respect to this litigation would be considered."); *see also Hiles v. Mortgage*, 2016 WL 454895, at *4 (S.D. Oh. Feb. 5, 2016) (enjoining and prohibiting vexatious litigant "from filing any additional motions in this case without leave of Court.").[2]

Finally, the fact that Andrews is a *pro se* litigant does not excuse him from such sanctions. *See Gitler v. Ohio*, 632 F. Supp. 2d 722, 727 (N.D. Ohio 2009) ("Although §1927 on its face limits who may be sanctioned to 'an attorney or other person allowed to conduct cases,'

[2] *See also United States v. Brown*, 2013 WL 6827951, at *2 (W.D. Tenn. Dec. 20, 2013) (finding that Brown is a vexatious litigant who has restricted filing privileges under 28 U.S.C. § 1915(g); ordering litigant to file no further pleadings until court ruled on pending motions; warning that any violation of the order would be treated as contempt and result in sanctions; and ordering Clerk of Court to not accept any further pleadings for filing in the case until further order of the Court); *In re Atchison-Jorgan*, 2014 WL 1516218 (E.D. Mich. Apr. 17, 2014) (ordering submissions stricken from the docket as filed without legal authority and as frivolous and vexatious); *Smith v. Parks*, 2016 WL 2869776, *3 (E.D. Ky. May 17, 2016) ("Due to the high volume and repetitive, frivolous nature of his filings, it is necessary to enjoin Smith from filing any additional motions or other pleadings in this case without prior permission from the Court ... An injunction is necessary to achieve an orderly, expeditious disposition of this case. Each time Smith files a motion ... he forces both the Court and the Defendants to needlessly expend resources evaluating and dealing with this filings."); *Shaw v. Commissioner of Social Sec.*, 2013 WL 5944785, *2 (E.D. Mich. Nov. 6, 2013) (enjoining Plaintiff "from filing any more papers in this case without first obtaining leave of Court. Any future motions filed without leave will be summarily dismissed.").

courts in the Sixth Circuit can sanction *pro se* litigants under that provision."); *see also Moore v. Lafayette Life Insurance Co.*, 458 F. 3d 416, 446-447 (6th Cir. 2006) (finding district court did not abuse its discretion in holding Plaintiff's attorney and Plaintiff jointly and severally liable for defendant's attorneys' fees under §1927); *Tareco Properties, Inc. v. Morris*, 321 F. 3d 545, 550 (6th Cir. 2003) (upholding district court's order sanctioning both defendant and his attorneys for filing frivolous pleadings in contravention of §1927); *Best v. AT&T, Inc.*, 2014 WL 1923149, *3 (S.D. Oh. May 14, 2014) (noting the strain on judicial resources caused by frivolous filings and holding that the leeway given to *pro se* plaintiffs "is not without its limits and plaintiff is not entitled to file frivolous motions"; cautioning vexatious litigant that "future filings deemed frivolous will be stricken from the record and may subject him to sanctions, including revocation of electronic filing privileges").

II. Andrews' Repeated Bad Faith and Vexatious Conduct Warrants The Imposition of Sanctions Now To Prevent Further Damage to the Class.

This Court has denied three separate meritless motions by Andrews seeking to overturn or stay the appeal bond. On April 13, 2016, this Court imposed a $145,463 appeal bond on Andrews to protect the class from the costs incurred by Andrews' frivolous pursuit of his meritless appeal. (Doc. # 2068.) Rather than post the bond, on April 27, 2016, Andrews filed a motion to stay the bond order (Doc. # 2075). Prior to obtaining a ruling on his motion, Andrews then filed, on May 4, 2016 a "Motion for Reconsideration/Stay on Bond Order under Rule 59(e)" (Doc. # 2083) and a "Supplemental Motion to Reconsider Order – Appeal Bond pursuant to FRCP 59(e)." Doc. # 2082. On May 12, 2016, this Court denied all of his motions, stating that they "are yet another misguided attempt to delay this litigation, and confirm this Court's earlier conclusion that an appeal bond is both appropriate and fully justified." Doc. # 2089 at 2.

Similarly, the Sixth Circuit has also denied Andrews' pleadings to overturn the bond order and dismissed Andrews' appeal for failing to post bond, *after* Andrews made the same argument to it regarding *Shane* that he made to this Court. On May 14, 2016, the Class moved in the Sixth Circuit to dismiss Andrews' appeal for failure to file the appeal bond. App. No. 16-3168, Doc. 28. A few days later, Andrews filed a cross-motion to stay or reverse the appeal bond. App. No. 16-3168, Doc. 30. Andrews subsequently filed two more pleadings under Fed. R. App. P. 28(j), directing the Sixth Circuit's attention to its decision in *Shane v. Blue Cross Blue Shield*, No. 15-1544, and arguing that *Shane* somehow excused him from having to comply with this Court's Order imposing the appeal bond. App. No. 16-3168, Doc. 34 and 37. On June 20, 2016, the Sixth Circuit affirmed this Court's Order imposing the bond, denied Andrews' motion for relief from the bond, and dismissed Andrews' appeal. App. No. 16-3168, Doc. 38-1. In so doing, the Sixth Circuit stated that "Andrews may move to reinstate his appeal only if he posts the full amount of the appeal bond ($145,463) no later than fourteen (14) days after this order is entered on the docket." *Id*.

Instead of posting the appeal bond, Andrews then filed, in this Court, a *fifth* motion attacking the appeal bond, entitled "2nd Motion for Reconsideration/Stay on Bond Order under Rule 59(e) Based on New Case Law Under *Shane v. Blue Cross* 15-1544" on June 23, 2016 (Doc. # 2102), in which he advanced the same arguments regarding *Shane* that he previously, and unsuccessfully advanced in the Sixth Circuit. When this Court denied this motion, Andrews filed on June 27, 2016—without posting the appeal bond—a petition for *en banc* review, in which he continued to argue the purported merits of his objections and appeal.

Knowing that there are built-in delays in the judicial process, since November 2015, Andrews has without repercussions and reprisals, gamed the judicial system, frustrated, and

impeded the orderly judicial progress of this complex litigation to reach finality. He has persistently flouted this Court's Order to post an appeal bond and repeatedly expressed his intention to continue his course and delay in achieving finality of the Settlements, including threatening to file a petition for a writ certiorari in the U.S. Supreme Court. Andrews has not heeded this Court's warnings, and has demonstrated that he will not stop filing frivolous and vexatious documents unless this Court stops him.

Those who file "unfounded, unmerited, and unsuccessful motions for reconsideration simply because they disagree with a ruling, decision, or order should expect to be sanctioned to the full extent permitted under…28 U.S.C. § 1927." *Miller v. Norfolk Southern Rwy. Co.* 208 F.Supp.2d 851, 854 (N.D. Ohio 2002). As Judge Carr has cautioned:

> Nearly two years ago I published a decision in which I undertook to notify counsel that unsuccessful motions for reconsideration would be sanctioned [] *Miller v. Norfolk Southern Rwy. Co*., 208 F. Supp. 2d 851 (N.D. Ohio, 2002)…The hour I spent in reviewing the motion, my former order, and writing this order is an hour wasted for no useful purpose, and an hour taken from the several other matters awaiting my attention. Counsel was, or certainly should have been on notice of the risk he took in filing the instant motion.

Great Lakes Towing Co. v. Kornmeier, 299 F.Supp.2d 793, 794-95 (N.D. Ohio 2014).

In addition, as detailed *supra*, this Court and the Sixth Circuit have repeatedly found Andrews' filings to be frivolous and vexatious. Andrews' half a dozen filings challenging the bond order were not simply meritless, they were based on the *exact same* points and authorities that this Court and the Court of Appeals had already rejected time and time again. Nevertheless, this Court has been reluctant to impose sanctions against him in the past.

The parties and this Court have invested substantial resources to help secure one of the largest all-cash recoveries for a consumer class. Accordingly, the Court has an obligation to protect the Class from damages as a result of pernicious serial objectors. Andrews has already

forced the Class to incur thousands of dollars in lost interest income since April, and the Class will continue to lose thousands in monthly interest from his continued vexatious and frivolous filings, as Defendant, Carpenter Co., is not required to pay its $43.5 million settlement into escrow while Andrews' claims are pending. As a result, the Court should not only impose monetary sanctions against him for the $13,086.30 in lost interest from April 2016 through September 2016, but should also exercise its statutory power to enjoin him from making any further filings in this case without first obtaining leave of this Court.

CONCLUSION

Wherefore, Plaintiffs request that this Court enter sanctions against Andrews pursuant to 28 U.S.C. §1927 as follows:

a. Ordering that he pay to the Class the sum of $13,086.30 which represents interest already lost to the Class from April 2016 through September 2016, by the delay to achieve final approval of the Carpenter Settlement due to Andrews' frivolous and vexations filings in the District Court and in the Sixth Circuit; and

b. Enjoining Andrews from filing any papers in the District Court without first obtaining approval of the appropriate court.

Dated: September 27, 2016

Respectfully submitted,

/s/ *Marvin A. Miller*
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Counsel for Indirect Purchaser Plaintiff Class

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, pursuant to Local Rule 5.1(b)-(c) and Initial Case Management Conference Order dated January 20, 2011 (Dkt. No. 17). Parties may access this filing through the Court's system. Service via U.S. mail was made upon the following counsel and/or *pro se* parties:

Christopher Andrews
P.O. Box 530394
Livonia, MI 48153-0394

/s/ Marvin A. Miller
Marvin A. Miller

EXHIBIT A

Marvin A. Miller

From: caaloa <caaloa@gmail.com>
Sent: Thursday, September 15, 2016 4:00 PM
To: Marvin A. Miller
Subject: The 6th Circuit and sealing records

Dear Counsel,

What do you make of this as it applies to the sealing issues raised in our case (my missing damage report request) and the bond issue where none is clearly needed. Do you really think the 6th would allow the bond order to stand and have me win at the Supreme Court? Fix the issues.
Chris Andrews

Since *Shane Group*, document sealing has been on the Sixth Circuit's mind. A few weeks later, the court sua sponte vacated orders to seal motions for summary judgment and accompanying exhibits. *Beauchamp v. Fed. Home Loan Mortg. Corp.*, No. 15-6067, 2016 WL 3671629, at *4-5 (6th Cir. July 11, 2016). Later, relying once again on *Shane Group*, the Sixth Circuit handed a team of BakerHostetler attorneys a victory on appeal, affirming the unsealing of an entire case. *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, No. 16-5055, 2016 WL 4410575 (6th Cir. July 27, 2016).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust Litigation	Case No. 1:10 MD 2196
	ORDER OF CIVIL CONTEMPT
This document relates to: ALL DIRECT PURCHASER CLASS ACTIONS	JUDGE JACK ZOUHARY

Pending before this Court is Indirect Purchaser Plaintiffs' Motion for Finding of Civil Contempt against *pro se* Objector Christopher Andrews (Doc. 2125). The Motion, which follows a series of filings which this Court summarizes next, is granted.

On October 24, this Court found that Andrews had engaged in a pattern and practice of the "vexatious use of the judicial system" and further found that Andrews had for some time "ignored both this Court's Orders and rulings from the Sixth Circuit" (Doc. 2113 at 2). As a result, this Court imposed a monetary sanction of $15,303. Andrews moved twice to reconsider and those requests were denied (Doc. 2115–17, 2123)

On November 29, class counsel served Andrews with a Notice of Deposition and Request for Production of Documents to assist in their efforts to collect on the monetary sanction. Andrews was noticed to produce financial records by December 19 and appear for a deposition on December 20. Andrews then moved this Court to cancel or stay the deposition (Doc. 2119) which class counsel opposed (Docs. 2120–2122). This Court granted Andrews a one-day extension, ordering him to appear for his deposition on December 21 (Doc. 2124), with the warning that failure to appear could result in an additional sanction.

On December 14, Andrews repeated that he would not attend the December 21 deposition. His reasons were frivolous, primarily indicating he had no time to do anything but prepare papers for a Writ of Certiorari to the United States Supreme Court on an appeal of earlier Orders from both this Court and the Sixth Circuit. This Court denied Andrews' request for any further postponements. *See*

letters from Andrews, attached as Exhibits A and B, which were not filed pursuant to this Court's Order (Doc. 2123).

Perhaps not surprisingly, Andrews failed to produce any documents and failed to appear for his deposition as ordered. A phone call from class counsel to inquire as to his whereabouts went unanswered (Doc. 2126). His disappearing act remains unexplained.

In a similar situation, in the case of *In Re TFT-LCD*, 289 F.R.D. 548, 553–54 (N.D. Cal. 2013), objectors to an antitrust class action settlement were ordered to appear for depositions, but failed to do so. The court there found that the objectors and their counsel violated a court order requiring the appearance of the objectors for deposition. The court further found the objectors failed to show efforts to comply with the court order, or provide sufficient justification for failing to comply, and therefore held the objectors in civil contempt, awarding monetary sanctions to compensate class counsel for fees incurred pursuing the depositions.

That same holding applies equally here. Objector Andrews has already provided this Court with an "in your face" statement (Exhibits A and B) that under no circumstances would he attend the deposition, against a background of this Court's patient handling of his ongoing misconduct. Andrews proclaimed he would make no effort to comply with this Court's Order, and this Court finds, by clear and convincing evidence, that Andrews be held in civil contempt. The United States Marshals are directed to bring Andrews before this Court as soon as practicable for him to answer why he should not be required to pay an additional monetary sanction in light of his continued contumacious conduct, and his undisguised failure to follow this Court's December Orders.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

December 29, 2016

Clerk of the Court

U.S. District Court

Northern District of Ohio

United States Courthouse

1716 Spielbusch Avenue

Toledo, OH 43604

Polyurethane Foam Antitrust Litigation,

Case No. 10-MD-2196

Judge Jack Zouhary

Christopher Andrews, Pro se Objector

Response to Docket 2122

The request to send a check to American Deposit Management Co., Escrowee is legally invalid. Because Class Counsel failed to do their job properly, the Court failed to appoint and/or reappoint Class Counsel, the Claims Administrator and the Escrow agent making the entire approval legally invalid and reversible, the Supreme Court will accept the Writ and reverse the appeal bond order.

The defendants have no and had no legal obligation to send funds to an entity that legally does not have to follow any court orders and decrees because the court has no oversight and authority over them. There is no lost interest since the funds should not be in that institution to begin with. Counsel is at fault for not forcing defendant to pay up front, Class Counsel should absorb this interest allegedly lost. Any sanctions, collection of interest, a creditor's hearing and the demand to send a check to a nonparty in this litigation is void. What a legal quagmire Class Counsel has gotten the parties into. The creditor's hearing is a bit premature and unlawful.

I certify under penalty of perjury that all of the above is true and accurate to the best of my knowledge.

Chris Andrews, Pro se, December 08, 2016 PO Box 530394,
Livonia, MI 48153-0394, Telephone 248-635-3810 Email: caaloa@gmail.com

Proof of Service

I hereby certify that on December 08, 2016 I sent by USPS Priority Mail this document to the Clerk of the United States Court and sent a copy to Mr. Miller via first class mail.

Chris Andrews
PO Box 530394
Livonia, MI 48153-0394
Telephone 248-635-3810
Email: caaloa@gmail.com
Pro se Appellant

Clerk of the Court

U.S. District Court

Northern District of Ohio

United States Courthouse

1716 Spielbusch Avenue

Toledo, OH 43604

Polyurethane Foam Antitrust Litigation,

Case No. 10-MD-2196

Judge Jack Zouhary

Christopher Andrews, Pro se Objector

Response to Orders 2123 and 2124

Dear Mr. Miller,

I am in receipt of the Court's latest orders. If I don't have time to attend a Preliminary Approval hearing in Detroit tomorrow, December 13, 2016, I surely don't have the time to drive 65 miles or approximately 80 minutes one way into Ohio to attend a hearing (another five-six hours shot) that is designed and absolutely does hinder my ability to finish this writ accurately and on time. I also could not attend a final approval hearing in CA on Friday December 16 2016, out of time and money.

The Court and class counsel are hindering my ability to accurately finish this Writ accurately and on time, both parties have a vested interest in causing me delay, and hope I make a mistake but the parties have everything to lose when this writ is accepted, hence this rush to depose. This objector is also unaware he can appeal the court's orders, and now that I know I don't have the time to file anything.

The court mentioned something about my time to file the writ. As a result I have just reviewed the Supreme Court guidelines and the amount of time I have left to file is not December 20, 2016 but December 27, 2016, based on the postmark date, not on the arrival date, and I will need every extra hour of it. You have now cost me 11 hours of time in the last three weeks, you will not waste any more of it, I will not be hurried.

I will be filing the writ In forma pauperis so if you wait two more weeks you will find the hearing you have scheduled and the court agreed to is waste of time. Unfortunately I will not be able to attend on Wed December 21, 2016 for all the reasons listed above and in my previous filings so please reschedule. I will not open any emails, snail mail or listen to voicemails regarding this case until the writ is in the mail. I will then send an email soon after that occurs to arrange a time to sit for your deposition. Wait until the parties see this jaw dropping writ which will get the bond reversed and eventually the approval reversed and your fee forfeited. Does the court know about the huge fraud fib in your fee petition that causes the fee award to violate and conflict with this circuit's, other circuit's and Supreme Court precedent?

You mentioned in a previous email that I had a "schedule" I had received regarding the sanctions. False, I have nothing in my possession. The Court's order is vague and ambiguous as to how this alleged damage amount is calculated and what it is based on. I will not accept responsibility for other's errors.

Chris Andrews

Blue Cross hearing next week

caaloa <caaloa@gmail.com> Dec 8 (4 days ago)

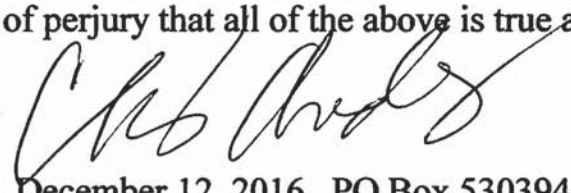
to Dan

Dear Dan,

The writ to the Supreme Court in foam case is taking longer than expected so every hour counts. In addition to that is the the fact that counsel in foam has wasted ten hours hours of my valuable time dealing with and responding to the deposition and documents hearing and filings being made on both sides which, as intended, has hindered the completion of the writ being completed in appropriate time tranches. I will therefore be unable to attend the hearing Tuesday, most unfortunate.

Chris Andrews

I certify under penalty of perjury that all of the above is true and accurate to the best of my knowledge.



Chris Andrews, Pro se, December 12, 2016 PO Box 530394,

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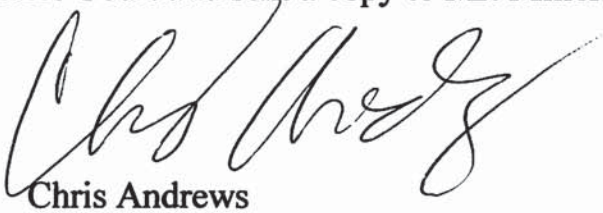
Proof of Service

I hereby certify that on December 12, 2016 I sent by USPS Priority Mail this document to the Clerk of the United States Court and sent a copy to Mr. Miller via first class mail.



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Pro se Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust Litigation	Case No. 1:10 MD 2196
	O R D E R
This document relates to: ALL INDIRECT PURCHASER CLASS ACTIONS	JUDGE JACK ZOUHARY

Pending before this Court is *pro se* Objector Christopher Andrews' Motion for Permission to Appeal *in forma pauperis* (Doc. 2156). Andrews' finances have been the subject of much debate during this litigation (*see, e.g.*, Docs. 2119, 2120, 2121, 2122, 2125, 2126, 2127, 2133, 2140, 2141). Under the circumstances, this Court requires additional documentation of Andrews' financial status to effectively evaluate his Motion. Accordingly, class counsel shall promptly file under seal the documents referenced in the January 9 and January 13 Orders (Docs. 2133, 2141), which were produced by Andrews during the limited discovery related to the October 24 Order (Doc. 2113).

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

March 22, 2017